JURAIMI HUSIN

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CRIMINAL APPEAL NO: C-05-16-95]
23 DECEMBER 1997

CRIMINAL LAW: *Penal Code - Section 34 - Conditions to be satisfied*

CRIMINAL LAW: *Penal Code - Section 300 - Whether there are any exceptions to the offence of murder - Whether judge had properly directed the jury on this point*

EVIDENCE: *Admissibility - Fresh evidence - Conduct of trial judge - Criticisms and interruptions by trial judge - Whether accused persons deprived of fair trial*

EVIDENCE: *Admissibility - Statements made during voire dire - Jury deprived of opportunity of hearing such evidence - Whether there was a breach of the Yaacob rule - Whether such breach had occasioned a substantial miscarrriage of justice - Evidence Act 1950, s. 167*

EVIDENCE: *Admissibility - Statement made under s. 113 of Criminal Procedure Code - Voluntariness of such statement - Burden of proving voluntariness of such statement - Test to be applied*

EVIDENCE: *Admissibility - Statements leading to discovery of fact - Whether such statements subject to the voluntariness principle - Evidence Act 1950, s. 27*

EVIDENCE: *Admissibility - Unsworn statements made by accused person - Whether jury properly instructed on such statements*

EVIDENCE: *Burden of proof - Defence of insanity - Whether failure of accused person to prove insanity affected arguments by second and third accused persons*

EVIDENCE: *Standard of proof - Close of prosecution's case - Whether high standard imposed by judge had prejudiced accused*

EVIDENCE: *Circumstantial evidence - Direction to jury - Whether any particular form of words necessary to direct jury on burden and standard of proof*

EVIDENCE: *Confession - Confession of a co-accused - Whether confession of a co-accused may be used against the other accused persons*

EVIDENCE: *Confession - Whether conviction can be based solely on a confession - Whether corroboration required*

CRIMINAL PROCEDURE: *Jury - Direction to jury - Prejudicial aspects of the case - Whether judge had properly directed jury*

The accused persons, Juraimi Husin, Mohd Affandi and Maznah Ismail were jointly charged for the murder of Dato' Idros (also known as Dato' Mazlan), a member of the Legislative Assembly of the State of Pahang – whose body, decapitated and cut into 18 pieces, was found buried in the premises occupied by the accused persons. The trial was before a judge and jury in the High Court at Temerluh – and lasted 69 days. At the conclusion of the trial, the accused persons were found guilty and sentenced to death. They now appealed.

Before the substantive appeals were argued, the court had to deal with two motions filed by the appellants, the second motion depending very much on the outcome of the first motion. By the first motion, the first appellant sought to adduce further evidence before the court on the conduct of the judge who presided over the trial. It was argued that the judge had so miconducted himself that all the three appellants had been deprived of a fair trial. The second motion was also based on the conduct of the judge who allegedly interrupted the course of the trial and criticised the conduct of counsel for the defence.

The substantive grounds of appeal were as follows: (i) that the statements by the appellants had been wrongly admitted in evidence; (ii) that the jury was not given an opportunity to consider the weight to be given to the statements made by the appellants, thus breaching the rule in *Yaacob*; (iii) that there was wrongful admission of the discovery statements made by the first appellant; (iv) that the judge had misdirected the jury on the application of s. 30 of the Evidence Act 1950 against the second and third appellants; (v) that the judge did not sufficiently draw the jury's attention to the contents of the second appellant's cautioned statement, resulting in serious prejudice; (vi) that the judge did not sufficiently direct the jury on the weight to be attached to the unsworn statement of the third appellant given in her defence; (vii) that there had been a misdirection on the standard of proof at the close of the prosecution's case; (viii) that there was a misdirection on s. 34 of the Penal

Code; (ix) that there was a misdirection on the defence of insanity of the first appellant and that the misdirection had seriously prejudiced the second and third appellants; (x) that the judge did not properly direct the jury on the law governing circumstantial evidence – and in any event, the evidence of circumstances in the case contained explanantions within it and was therefore insufficient to support the prosecution's case – and that the judge did not properly instruct the jury on this aspect of the case; and (xi) that there was non-direction on the prejudicial aspects of the case.

Held:
Per Gopal Sri Ram JCA

[1] There is a distinction between the conduct on the part of a presiding judge which may be regarded as discourteous and may show signs of impatience, ie, conduct which cannot be commended in any way but which does not in itself invite the jury to disbelieve the defence witnesses, and conduct which positively and actively obstructs cousnel in the doing of his work. Unless evidence sought to be adduced shows an attack by the presiding judge upon the accused's case rather than upon the attitude of counsel, the court should be very slow in the matter of reception of fresh evidence for the purpose of establishing the deprivation of a fair trial.

[1a] Interruptions by a trial judge, making it impossible for defence counsel to do justice to the defendant will result in a conviction being quashed. In this case, the evidence concerned exchanges between defence counsel and the judge during the *voir dire* as well as the trial in general where the judge had asked counsel not to repeat a question, the answer to which had already been given. This was followed by a heated exchange between counsel and judge. The complaint therefore amounted to a criticism of counsel in his handling of the case rather than the case itself. Therefore, there was never at any time any risk to the accused persons either in their attack on the prosecution witnesses or in the presentation of their defence.

[1b] Furthermore, in summing up the case to the jury, the judge had instructed them to the effect that they should ensure that the accused persons received a fair trial – this probably done to sweep away from their minds any wrong impression that might have arisen by reason of the exchange between him and counsel for the second and third appellants. The record also showed many pages devoted to cross-examination by counsel for the second and third appellants. In any event, there was nothing to show that counsel for the appellants were prevented from discharging the duty placed upon his shoulders.

[2] A statement made under s. 113 of the Criminal Procedure Code should be made voluntarily and the burden lies upon the prosecution to prove the voluntariness of such statement beyond a reasonable doubt, the test applicable being partly objective and partly subjective. Once a confession based on such a statement is admitted, a conviction may be based solely on its strength. However, as a matter of practice and prudence, the court ought to look for corroboration of the incriminating parts of the confession. On the facts of the case, there was nothing improper in the manner in which the statement of the first appellant was recorded by the officer in charge of the investigations. The statement was therefore made voluntarily – the product of a free mind, untainted by any illegitimate pressure.

[3] Although the statement made by the first appellant was admitted in evidence, the evidence adduced during the *voir dire* was not repeated before the jury. The jury was therefore deprived of an opportunity to hear all the evidence led during the trial within a trial. There was therefore a breach of the rule in *Yaacob*. However, the issue was whether such a breach had occasioned a substantial miscarriage of justice. It would result in a substantial miscarriage of justice if it resulted in a decision different from that which would have been given had the evidence not been admitted. Based on the facts and circumstances of the case, the breach of the rule in *Yaacob* had not resulted in a substantial miscarriage of justice as there was sufficient cogent evidence to justify the jury's verdict.

[4] The discovery statements made by the first appellant was not subject to the voluntariness principle as laid down in *Md Desa Hasim v. PP* as the information given did not amount to a confession. Furthermore, there was no challenge taken when the impugned pieces of information were adduced in evidence. The statements therefore were rightly admited in evidence.

[5] The statement made by the second accused was inculpatory and the trial judge had sufficiently left the matter for the jury to decide. No prejudice whatsoever was occasioned to the second accused by the way in which the judge dealt with the matter.

[6] The summing-up of the trial judge revealed that he had instructed the jury that although the statement of the third accused from the dock was unsworn, they were bound to consider it and decide whether it raised a reasonable doubt in their minds. In this case, the matter was put most fairly to the jury.

[7] On misdirection on the standard of proof, what the learned judge said was that the prosecution had adduced sufficient evidence at the close of its case. He went on to say that if the accused persons had elected not to give evidence, the court would have had to convict then. Since the judge had imposed a high burden on the prosecution, the appellants had therefore not been prejudiced.

[8] On the issue relating to the confession of a co-accused, the evidence against an accused person must be first marshalled, putting aside the confesion of the co-accused. If the court is prepared to convict on the other evidence, it may pray in aid the confession of the co-accused to lend assurance to the conclusion of the guilt already arrived at. In the present case, the judge's summing up when read as a whole made it abudantly clear that the jury was instructed in clear terms that it should consider the evidence apart from the confession. The judge had warned the jury on the danger of acting on the confession of a co-accused. There was therefore a proper direction on s. 30 of the Evidence Act 1950.

[9] Under s. 34 of the Penal Code, two conditions must be satisfied, namely: (a) that there is evidence that the accused was present at the scene of the crime; and (b) that there is evidence to show that there was prior concert or prearranged plan involving the accused. Based on the facts and circumstances of this case, there was no misdirection to the jury on the issue of common intention. The judge's direction on this point was entirely adequate in the circumstances of the case.

[10] On the issue of insanity, the question whether a judge ought to direct the jury on the possibility of an alternate verdict depends upon the nature of the evidence in the particular case. If there is some evidence, however weak, that will bring into operation one or more of the exceptions to murder, the judge is duty bound to leave it to the jury with an appropriate direction on the point. In this case, there was no evidence whatsoever to suggest the availability of any of the exceptions appearing under s. 300 of the Penal Code. It followed therefore that there was no duty whatsoever on the judge to include in his charge to the jury a direction upon the point.

[10a] Since the first accused had failed to bring himself within the exception of insanity, it was no longer open to the second and third accused to argue that they could not be found to have acted in furtherance of a common intention with the first accused.

[11] On the issue of circumstantial evidence, no particular form of words is necesssary to convey to the minds of the jury the burden that lies upon the prosecution when it relies on circumstantial evidence to establish its case. The proposition that circumstantial evidence must, when taken together, irresistibly lead to the conclusion that the accused committed the offence is merely another way of saying that the prosecution must prove its case beyond reasonable doubt. This is because any gap in the circumstances relied upon or an interpretation of them that reasonably leads to an alternative conclusion inconsistent with guilt will result in the prosecution not having proved its case beyond a reasonable doubt.

[11a] In this case, the judge had not misdirected the jury on the law governing circumstantial evidence as he had, in the course of summing-up, took exceptional care to explain to the jury the nature of circumstantial evidence.

[11b] Furthermore, there was sufficient admissible evidence before the jury which, if believed, would establish the offence with which the accused persons were charged.

[12] There was no failure on the part of the judge to direct the jury on the prejudicial aspects of the case, in particular on the issue of being moved by the photographs of the dismembered body of the victim. The way in which the crime was committed and the deliberate manner in which the body was dismembered to facilitate burial were matters in which the jury were entitled to take into account when determining whether the killing was done with the proscribed intention. Any direction that had the effect of watering down the seriousness of the crime would have been a serious misdirection, as it would have required the jury to exclude matters that laid squarely within their domain.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Sitertuduh, Juraimi Husin, Mohd Affandi dan Maznah Ismail telah dituduh bersama untuk pembunuhan Dato' Idros (juga dikenali sebagai Dato Mazlan), ahli Majlis Perundangan Negeri Pahang – di mana mayatnya yang didapati telah dipancung kepala dan dikerat kepada 18 bahagian, telah dijumpai tertanam di tempat di mana sitertuduh menetap. Perbicaraannya telah diadakan di hadapan hakim dan juri di Mahkamah Tinggi Temerloh – yang berjalan selama 69 hari. Di akhir perbicaraan, tersebut, sitertuduh telah didapati bersalah dan dihukum mati. Mereka sekarang merayu.

Sebelum rayuan substantif dihujahkan, mahkamah terpaksa memutuskan dua usul yang difailkan oleh perayu-perayu yang mana usul kedua bergantung sangat ke atas keputusan usul pertama. Atas usul pertama, perayu pertama cuba mengemukakan keterang baru di hadapan mahkamah berdasarkan kelakuan hakim perbicaraan tersebut. Telah dikatakan bahawa hakim telah berkelakuan tidak wajar sehinggakan ketiga-tiga perayu telah tidak menikmati perbicaraan yang adil. Usul yang kedua juga adalah berdasarkan kelakuan hakim yang dikatakan telah mengganggu perjalanan perbicaraan dan telah mengkritik tindakan peguambela.

Dasar rayuan yang substantif adalah seperti berikut: (i) bahawa pernyataan perayu-perayu telah salah diterima-masuk sebagai keterangan; (ii) bahawa para juri telah tidak diberi peluang untuk mempertimbangkan kekuatan yang patut diberi kepada pernyataan-pernyataan yang dibuat oleh perayu-perayu, maka dengan itu telah melanggar peraturan dalam kes *Yaacob* (iii) bahawa pernyataan oleh perayu pertama yang telah mengakibatkan perjumpaan fakta telah salah diterima-masuk; (iv) bahawa hakim telah salah mengarah para juri atas pemakaian s. 30 Akta Keterangan terhadap perayu-perayu kedua dan ketiga; (v) bahawa hakim yang arif telah tidak dengan secukupnya menarik perhatian para juri kepada kandungan pernyataan beramaran perayu kedua, dan ini telah mengakibatkan prejudis yang serius; (vi) bahawa hakim yang arif telah tidak dengan secukupnya mengarahkan para juri atas kekuatan yang harus diberi kepada pernyataan tidak bersumpah perayu ketiga yang diberikan dalam pembelaannya; (vii) bahawa telah berlakunya arahan yang salah atas darjah pembuktian pada akhir kes pendakwaan; (viii) bahawa terdapatnya salah arahan atas s. 34 kanun Keseksaan; (ix) bahawa terdapatnya salah arahan atas pembelaan ketidakwarasan perayu pertama dan bahawa salah arahan ini telah memprejudiskan perayu-perayu kedua dan ketiga; (x) bahawa hakim yang arif telah gagal mengarahkan para juri dengan betul atas undang-undang berkenaan dengan keterangan mengikut keadaan dan lagipun, keterangan mengikut keadaan dalam kes ini telah mengandungi penerangan dalamnya dan oleh kerana itu adalah tidak cukup untuk menyolong kes pendakwa – dan bahawa hakim telah tidak mengarahkan para juri dengan betul; (xi) bahawa tidak terdapatnya arahan mengenai aspek-aspek prejudis kes ini.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Terdapat perbezaan di antara kelakuan oleh hakim yang boleh dianggap sebagai tidak wajar dan yang menunjukkan tanda-tanda ketidaksabaran iaitu kelakuan yang tidak dapat dipuji dalam mana carapun tetapi yang tidak akan mengakibatkan para juri supaya tidak mempercayai saksi-saksi pembelaan dan kelakuan yang secara positif and aktif yang menjejaskan peguambela dalam menjalankan tugasnya. Kecuali jika keterangan yang hendak dikemukakan itu menunjukkan serangan oleh mahkamah atas kes tertuduh dan bukannya serangan atas tindakan peguambela, maka mahkamah harus tidak bergesa-gesa dalam menerimamasuk keterangan baru untuk memutuskan bahawa suatu perbicaraan yang adil tidak diperolehi.

[1a] Gangguan oleh hakim yang menjadikannya mustahil untuk peguambela supaya menegakkan keadilan kepada defendan akan mengakibatkan sabitan tersebut ditolak. Dalam kes ini, keterangan berkenaan merupakan persengketaan di antara peguambela dan hakim semasa *voire dire* dan juga perbicaraan secara am di mana hakim telah meminta peguambela supaya jangan mengulangi soalannya. di mana jawapannya telahpun diberi. Ini telah diikuti dengan persengketaan yang hangat di antara peguambela dan hakim. Maka aduan tersebut merupakan kritikan terhadap cara bagaimana peguambela mengendalikan kesnya berbanding dengan kritikan ke atas kes itu sendiri. Maka, tidak ada masa di mana terdapatnya risiko terhadap tertuduh tidak kira semasa serangannya terhadap saksi pendakwa mahupun semasa pengemukaan pembelaannya.

[1b] Selanjutnya, dalam menyimpulkan kes kepada para juri, hakim telah mengarahkan supaya mereka harus menentukan bahawa tertuduh telah menerima perbicaraan yang adil – kemungkinan ini dilakukan untuk mengalih, dari fikiran mereka, sebarang pandangan yang salah yang mungkin telah timbul akibat dari pertukaran di antara hakim dan peguambela untuk perayu-perayu kedua dan ketiga. Walau bagaimanapun, tidak terdapat apa-apa untuk menunjukkan bahawa peguambela telah dihalang daripada melakukan tugas yang dipikulnya.

[2] Pernyataan yang dibuat di bawah s. 113 Kanun Acara Jenayah harus dibuat secara sukarela dan bebannya adalah terletak di atas pendakwa untuk membuktikan kesukarelaan pernyataan tersebut tanpa keraguan yang munasabah. Ujian yang terpakai adalah sebahagian objektif dan sebahagian subjektif. Sekali sahaja suatu pengakuan salah berdasarkan pernyataan tersebut diterima-masuk, maka sabitan boleh didasarkan hanya

atas kekuatan pengakuan salah. Walau bagaimanapun, secara amalan dan kewibawaan, mahkamah harus mencari sokongan akan bahagian-bahagian salah diri pengakuan salah tersebut. Atas fakta-fakta kes ini, tidak ada apa-apa yang salah atau yang berkurangan dengan cara bagaimana pernyataan perayu pertama direkodkan oleh pegawai yang bertanggungjawab atas siasatan. Maka pernyataan tersebut adalah secara sukarela – hasil fikiran yang bebas dan yang tidak dipengaruhi oleh tekanan yang tidak sah.

[3] Walaupun pernyataan yang dibuat oleh perayu pertama telah diterima-masuk sebagai keterangan, keterangan yang dikemukakan semasa *voire dire* telah tidak diulangi di hadapan para juri. Para juri telah tidak mendapat peluang untuk mendengar kesemua keterangan yang dikemukakan semasa 'perbicaraan dalam perbicaraan'. Maka terdapatnya pelanggaran peraturan dalam kes *Yaacob*. Walau bagaimanapun, isunya adalah samada pelanggaran tersebut telah mengakibatkan pelanggaran keadilan yang substantial. Ianya akan mangakibatkan pelanggaran keadilan yang substantial jikalau ianya akan menghasilkan keputusan yang berlainan daripada keputusan yang akan diberi jikalau keterangan tersebut diterima-masuk. Berdasarkan fakta dan keadan kes, pelanggaran peraturan dalam kes *Yaacob* telah tidak mengakibatkan pelanggaran keadilan yang substantial oleh kerana terdapatnya keterangan yang kuat dan yang mencukupi untuk menjustifikasikan keputusan para juri.

[4] Pernyataan-pernyataan oleh perayu pertama yang mengakibatkan perjumpaan fakta adalah tidak tertakluk kepada prinsip kesukarelaan seperti yang diputuskan dalam *kes Md Desa Hashim v. PP* [1995] 3 MLJ 350 oleh kerana maklumat yang diberikan tidak terjumlah kepada suatu pengakuan salah. Lebih-lebih lagi, tidak ada cabaran ketika maklumat tersebut dikemukakan sebagai keterangan. Maka pernyataan-pernyataan tersebut telah ditermia-masuk dengan wajarnya.

[5] Pernyataan yang dibuat oleh perayu kedua adalah menyalahkan diri dan hakim perbicaraan telah dengan secukupnya membolehkan juri untuk memutuskannya. Tidak ada prejudis yang dilakukan kepada perayu kedua melalui cara hakim mengendalikan perkara tersebut.

[6] Kesimpulan yang dibuat oleh hakim perbicaraan telah menunjukkan bahawa dia telah mengarahkan juri dengan wajarnya bahawa walaupun pernyataan perayu ketiga dari kandangnya adalah tidak bersumpah, mereka adalah masih wajib mempertimbangkannya dan memutuskan samada ianya menimbulkan keraguan munasabah dalam fikiran mereka. Dalam kes ini, perkara tersebut telahpun dikemukakan kepada juri dengan adilnya.

[7] Mengenai salah arahan berkenaan dengan darjah pembuktian, apa yang dikatakan oleh hakim yang arif adalah bahawa pendakwa telah mengemukakan keterangan yang mencukupi di akhir kesnya. Dia terus mengatakan bahawa jikalau perayu memilih supaya langsung tidak memberikan keterangan, maka mahkamah harus mensabitkannya. Oleh kerana hakim telah mengenakan darjah pembuktian yang tinggi atas pihak pendakwa, maka perayu telah tidak diprejudiskan.

[8] Mengenai isu berkenaan dengan pengakuan salah tertuduh bersama, keterangan terhadap si tertuduh harus dipertimbangkan dahulu, sambil mengetepikan pengakuan salah tertuduh bersama. Jikalau mahkamah sedia mensabitkan berdasarkan keterangan yang lain, maka ianya boleh menggunakan pengakuan salah terhadap tertuduh bersama untuk membantunya menyokong keputusan yang sudah dibuatnya. Dalam kes ini, penyimpulan hakim yang arif, ketika dibaca secara keseluruhan, menunjukkan dengan jelas bahawa juri telah diarahkan dengan nyata bahawa mereka harus mempertimbangkan keterangan selain dari pengakuan salah itu. Hakim yang arif telah memberi amaran kepada juri akan bahayanya bergantung ke atas pengakuan salah tertuduh bersama. Maka telah adanya arahan yang wajar berdasarkan s. 30 Akta Keterangan 1950.

[9] Di bawah s. 34 Kanun Keseksaan, dua keperluan harus dipenuhi, iaitu (a) bahawa terdapatnya keterangan bahawa tertuduh berada di tempat berlakunya jenayah tersebut; dan (b) bahawa terdapatnya keterangan untuk menunjukkan pakatan terdahulunya ataupun rancangan yang diaturkan yang melibatkan tertuduh. Berdasarkan fakta-fakta dan keadaan kes, tidak ada arahan salah yang diberikan kepada juri berkenaan dengan niat bersama. Arahan hakim perbicaraan atas aspek ini adalah mencukupi berdasarkan keadaan kes tersebut.

[10] Atas isu ketidakwarasan, persoalan samada hakim harus mengarahkan juri atas kemungkinan keputusan alternatif adalah bergantung kepada sifat keterangan kes tersebut. Jikalau terdapatnya keterangan, walaupun yang lemah, yang akan melibatkan satu atau lebih pengecualian kepada pembunuhan, maka hakim adalah wajib membenarkan juri membuat keputusan dengan menberikan mereka arahan yang wajar. Dalam kes ini, tidak ada keterangan sama sekali yang mencadangkan bahawa terdapatnya mana-mana pengecualian di bawah s. 300 Kanun Keseksaan. Maka tidak terdapatnya tugas atas hakim yang arif untuk memberikan arahan kepada juri atas aspek ini.

[10a] Oleh kerana perayu pertama gagal membuktikan pembelaan ketidakwarasan, makanya tidak terbuka kepada perayu kedua dan ketiga untuk menghujahkan bahawa mereka tidak boleh didapati telah bertindak dengan niat bersama-sama perayu pertama.

[11] Mengenai isu keterangan mengikut keadaan, tidak terdapat bentuk perkataan yang khusus yang perlu untuk memberitahu juri bahawa beban pendakwa ketika ianya bergantung ke atas keterangan mengikut keadaan untuk membuktikan kesnya. Cadangan bahawa keterangan mengikut keadaan, ketika dilihat keseluruhannya, harus menuju ke arah kesimpulan yang tidak dapat dielakkan bahawa tertuduh telah melakukan kesalahan tersebut hanyalah satu cara lain untuk menyatakan bahawa pendakwa harus membuktikan kesnya tanpa keraguan yang munasabah. Ini adalah kerana sebarang kekosongan dalam keadaan yang didasarkannya atau interpretasinya akan menuju kepada kesimpulan yang alternatif yang tidak selaras dengan kebersalahan, yang akibatnya adalah bahawa pendakwa telah tidak membuktikan kesnya tanpa keraguan yang munasabah.

[11a] Dalam kes ini. tidak ada arahan salah yang diberikan oleh hakim yang arif kepada juri mengenai undang-undang berkenaan dengan keterangan mengikut keadaan kerana dalam penyimpulannya, dia telah berhati-hati sambil menerangkan kepada juri sifat keterangan mengikut keadaan.

[11b] Lebih-lebih lagi, terdapatnya keterangan yang boleh diterima-masuk yang mencukupi di hadapan juri, yang mana, jika dipercayai, akan membuktikan kesalahan terhadap tertuduh.

[12] Tidak ada kegagalan di pihak hakim untuk mengarahkan juri atas aspek-aspek prejudis kes ini, khususnya isu mengenai fotograf mayat si mati yang dikerat itu. Cara kesalahan ini dilakukan dan cara berniat bagaimana mayat dikerat untuk membolehkannya ditanam adalah perkara-perkara yang harus dipertimbangkan oleh juri ketika memutuskan samada pembunuhan tersebut dilakukan dengan niat yang tertentu. Sebarang arahan yang mempunyai kesan mengurangkan keseriusan kesalahan ini akan menghasilkan salah arahan yang serius, keranan ianya akan meminta juri mengecualikan perkara-perkara yang nyata adalah dalam lingkungan mereka.

[Rayuan ditolak.]

Cases referred to:

Abu Hussin v. Public Prosecutor [1959] MLJ 5 ***(refd)***
Ashiruddin Ahmed v. R [1949] 50 Cr LJ 255 ***(refd)***
Birch v. Public Prosecutor [1978] 1 MLJ 72 ***(foll)***
Chan Chwen Kong v. Public Prosecutor [1962] MLJ 307 ***(foll)***
Dato Mokhtar Hashim & Anor v. Public Prosecutor [1983] 2 MLJ 232 ***(foll)***
Director of Public Prosecutions v. Ping Lin [1976] AC 574 ***(foll)***
Director of Public Prosecutions v. Walker [1974] 1 WLR 1090 ***(foll)***
Hasibullah Mohd Ghazali v. Public Prosecutor [1993] 4 CLJ 535 ***(foll)***
Irfan Ali v. State [1970] Cri LJ 603 ***(refd)***
Jayaraman & Ors v. Public Prosecutor [1982] 2 MLJ 306 ***(foll)***
Jusoh v. Public Prosecutor [1963] MLJ 84 ***(refd)***
Kiew Foo Mui & 2 Ors v. Public Prosecutor [1996] 1 CLJ 14 ***(foll)***
Lee Look v. Public Prosecutor [1985] 1 MLJ 240 ***(dist)***
Md Desa Hashim v. Public Prosecutor [1995] 4 CLJ 677 ***(dist)***
Muluk Ahmad & Anor v. Public Prosecutor [1989] 2 CLJ 393 ***(refd)***
Public Prosecutor v. Alang Mat Nasir [1938] MLJ 153 ***(refd)***
Public Prosecutor v. Chong Boo See [1988] 3 MLJ 292 ***(foll)***
Public Prosecutor v. Lai Pong Yuen & Ors [1968] 1 MLJ 12 ***(foll)***
Public Prosecutor v. Law Say Seck [1971] 1 MLJ 199 ***(foll)***
Public Prosecutor v. Nordin Johan & Anor [1983] 2 MLJ 221 ***(foll)***
Public Prosecutor v. Thum Soo Chye [1954] MLJ 96 ***(refd)***
R v. Hircock [1969] 1 All ER 47 ***(foll)***
R v. Prager [1972] 1 WLR 260 ***(refd)***
R v. Priestley [1965] 51 Cr App R 1 ***(foll)***
R v. Weaver [1967] 1 All ER 277 ***(refd)***
Ramiah v. Public Prosecutor [1986] 1 MLJ 301 ***(refd)***
Ratten v. R [1974] 131 CLR 510 ***(foll)***
Teoh Seng Lian v. Public Prosecutor [1986] 1 MLJ 474 ***(foll)***
Wong Kok Keong v. R [1955] MLJ 13 ***(foll)***
Yaacob v. Public Prosecutor [1966] 1 MLJ 67 ***(foll)***
Yau Sun Fatt v. Public Prosecutor [1988] 1 MLJ 248 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 60, 61
Criminal Procedure Code, ss. 113, 115(3), 180, 214, 224(i)(a), 342, 343, 448
Dangerous Drugs Ordinance 1952, s. 37A
Evidence Act 1950, ss. 17, 24, 27, 30, 167
Penal Code, ss. 34, 84, 300, 304

Other sources referred to:

Archbold's Criminal Pleading, Evidence and Practice, 1997 edn, para 7-81
The Law of Evidence, Woodroffe & Ameer Ali, 16th edn, vol 4, p 3805

[Appeal from High Court, Temerluh; Criminal Trial No: 45-1-94]

For the 1st appellant - Karpal Singh (Manjit Singh, Jagdeep Singh Deo & Gobind Singh Deo with him); M/s Karpal Singh & Co

For the 2nd & 3rd appellants - Gulam Mustaffa Nadar Ali Khan (Shenton Maniam with him); M/s Gulam Mustaffa & Co

Reported by Mariette Peters-Goh

JUDGMENT

Gopal Sri Ram JCA:

The Background

In the very late hours of 2 July 1993, Dato' Idros, better known as Dato' Mazlan, a member of the Legislative Assembly of the State of Pahang mysteriously disappeared. A police report was lodged concerning his disappearance. The police made diligent inquiries. The body of Dato Mazlan was recovered. It had been decapitated and cut into eighteen pieces. It was found buried in premises at Ulu Dong occupied by the appellants. In due course the appellants were arrested. They were jointly charged and tried for the murder of Dato Mazlan. The trial was before a judge and jury at the Temerloh High Court. It lasted some sixty-nine days. There was much publicity about it in the print and electronic media. At the conclusion of the trial the appellants were found guilty and sentenced to death. They appealed to this court. We heard their appeals from 20 to 23 October 1997. We then reserved our decision to the following day, that is to say, 24 October 1997. We dismissed the appeals. We informed counsel that written reasons for our decision would be given. These are now produced.

In the court below, the appellant Juraimi Husin was the first accused while the other two appellants, Mohd Affandi and Maznah were the second and third accused respectively. The latter two accused gave notice of appeal earlier and for that reason appeared as the first and second appellants in Criminal Appeal No. 15/95. Juraimi lodged a separate notice of appeal and appeared as the appellant in Criminal Appeal No. 16/95. However, when the appeals were called on, we decided to hear them and to refer to the parties in the order in which they appeared before the High Court. All counsel before us agreed to this course. Accordingly, Encik Karpal Singh who appeared for Juraimi in the appeal (but not in the court below) was heard first, followed by Encik Gulam Mustaffa who appeared for the second and third accused both here and in the court below. Encik Azahar Mohamed and Encik Yusof Zainal Abiden, deputy public prosecutors responded to the arguments advanced in support of the appeal.

The Motions

Before the substantive appeals were argued, we had to deal with two motions filed by the first accused. By the first motion, the first accused sought to adduce further evidence before us on the conduct of the judge who presided over the trial. It was said that the judge had so misconducted himself that all three accused had been deprived of a fair trial. Counsel for the first accused wanted us to hear the testimony of Encik Gulam and certain newspaper reporters who had been present and had reported the course of the trial. He wished to adduce evidence of comments made by the judge during the *voir dire* and the trial general.

The second motion sought to incorporate a fresh ground of appeal based on the fresh evidence. That ground reads as follows:

> The conduct of the trial judge reflected through his impatience and frequent interruptions in the course of the trial in the form of criticism of conduct of Encik Mustaffa Nadar Ali Khan and grimaces has led to a manifest miscarriage of justice vitiating the trial.

We formed the view that the second motion depended very much on the outcome of the first. Accordingly we invited Encik Karpal Singh of counsel for the first accused to go forward on that application.

Counsel drew our attention to s. 61 of the Courts of Judicature Act 1964 which reads:

> 61 (1) In dealing with any appeal in a criminal case the Court of Appeal may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the trial court.
>
> (2) When the additional evidence is taken by the trial court, it shall certify the evidence, with a statement of its opinion on the case considered with regard to the additional evidence, to the Court of Appeal and the Court of Appeal shall thereupon proceed to dispose of the appeal.
>
> (3) The parties to the appeal shall be present when additional evidence is taken.
>
> (4) In dealing with any appeal in a criminal case the Court of Appeal may also, if it thinks fit, call for and receive from the trial court a report of any matter concerned with the trial.

It was submitted that this court has wide power in the matter of the reception of further evidence and the fourth subsection to s. 61 might be appropriately resorted to in the present case having regard to the nature of the evidence that was sought to be admitted. Counsel also referred us to the decision of the English Court of Appeal in *R v. Hircock* [1969] 1 All ER 47. The headnote to that case reads as follows:

> The appellants were charged with and convicted of assault occasioning actual bodily harm, and one of them of larceny. They appealed against conviction and sentence on the ground that the trial judge's conduct vitiated the fairness of the trial in that by interruptions, grimaces, groans, sighs and exclamations of impatience he had prejudiced the jury against the defence; leave was sought to call evidence of this conduct.
>
> Held: leave to call evidence was refused and the convictions upheld because examination of the transcript did not bear out the allegation of excessive interruptions, further there was a clear distinction between conduct which might be regarded as discourteous and showed signs of impatience and conduct which actively and positively obstructed counsel in conducting the defence, accordingly although the conduct complained of was of a kind which could not be condoned it was nevertheless not such that it caused the convictions to be unsafe or unsatisfactory.

Widgery LJ (later Lord Chief Justice) when delivering the judgment of the court said (at p. 49):

> The real sting of the complaint relates to a matter not in the transcript at all. It can be summarised by saying that the learned chairman indicated a high degree of impatience during the trial; and, in particular, that when counsel was seeking to address the jury on behalf of the appellant Leggett, he showed impatience in such a degree as to distract the jury from the submissions, which were being made, and, in brief, to create an atmosphere in which a fair trial could not be obtained. Accordingly, counsel for the appellants as the basis of his submissions to us has sought leave to call evidence from a number of gentlemen who were present at the trial to testify to the matters to which I have referred.
>
> The industry of counsel satisfies us that this is an approach which is novel so far as the reports go. There have been cases, as I say, where a trial has been held to be vitiated and the judge's conduct criticised by reference to the transcript; that is to say by reference to what the judge said in the course of the trial as recorded by the shorthand writer. But there is no case as far as we know where the conduct of the judge was sought to be attacked by evidence given from those present at the trial in respect of matters which the transcript does not disclose.

The first question for us to consider, as this point is novel, is whether evidence of this kind can ever be admitted. I refer to s. 23 of the Criminal Appeal Act 1968, which is the present authority regulating the calling of evidence in this court. It is to be observed that under s. 23(1) it is provided:

> ... the Court of Appeal may, if they think it necessary or expedient in the interests of justice ... (c) .. receive the evidence, if tendered, of any witness.

Accordingly, there is nothing in the statute to restrict the evidence which we can receive to witnesses who speak to the offence or the offender; and there is on the face of it no technical bar to our receiving evidence of what happened in the course of the trial.

The section goes on to provide by sub-s. (2) that the court shall receive evidence tendered in certain circumstances; but one ground on which the court can refuse to receive tendered evidence is, if it is satisfied that the evidence, if received, would not afford any ground for allowing the appeal.

The first question to which we have had to apply ourselves is whether the evidence which counsel for the appellants seeks to tender is evidence which ought to be excluded on that last mentioned ground. We have looked – indeed, the court must look in these circumstances – at the proofs from the witnesses whom the appellants seek to call. They are three in number: one from Mr. Alfred James Leggett (the father of the appellant Leggett), one from Mr. May (who was present at the trial in the public gallery) and one from a Mr Blake (the solicitor's clerk employed by the solicitors representing the appellant Leggett at the time).

So far as Mr. May and Mr. Blake are concerned, in their statements they both complain of persistent interruptions during the trial. Mr. Blake speaks of:

> persistent interruptions by the learned chairman, especially when defence counsel were cross-examining the prosecution witnesses, Mr. Durcan and Mr. Masters.

Mr. May says:

> Throughout the trial there were many interruptions and sarcastic remarks by the chairman when the defence counsel were questioning the prosecution witnesses, and particularly when questions were being asked about the positions of the four defendants during the struggle on the forecourt of the filling station.

As I have already said, the examination of the transcript, so far as the appellants have put it before us, shows that those allegations are entirely untrue. There were not persistent interruptions by the chairman at that stage at all.

Then all three of the proposed witnesses deal with another incident, which factually is accepted by counsel for the Crown, who was present at the trial and who has been able to help us in this regard. It seems that counsel then appearing for the appellant Leggett when he was about to address the jury after addresses by all other counsel, had indicated that in order to do justice to his case he was going to run through each accused's case in turn to establish the position of the appellant Leggett during the fight. It is evident that the prospect of this somewhat protracted re-examination of the circumstances was something which did not appeal to the chairman because all the witnesses say that he observed in a loud voice 'Oh God', and then laid his head across his arm and made groaning noises. There was a silence for a moment, and then the chairman looked up and said to counsel 'Yes, yes' in what is described as a 'testy way', and counsel regarded that as the signal to proceed with this address to the jury, which in fact he then undertook. It is said that throughout the speech the chairman kept sighing and groaning, and one witness at any rate said that he observed 'Oh, God' on more than one occasion.

The submission is that that evidence, if received, would form the basis of a further submission that this court should quash the conviction on the footing that the convictions were either unsafe or unsatisfactory. We are referred to *R. v. Clewer* [1953] 37 Cr. App. Rep. 37. I find it unnecessary to read the judgment of Lord Goddard CJ, in full; but it is evident in that case that complaint was being made by defence counsel that he had been frequently interrupted by the judge and never had an opportunity of putting his defence fairly before the jury. Later on it appears that the learned judge on that occasion had disparaged the defence which was being put forward and referred to counsel as putting up a 'dust storm', and had indicated that he regarded the defence as devoid of foundation. Another reference in the judgment of Lord Goddard CJ, showed that the learned judge on that occasion had been disparaging the defence which counsel was gallantly endeavouring to lay before the jury.

It is to be observed that all those matters in *R. v. Clewer* arose on the transcript. It was possible for the court to consider exactly what had happened because the matters of complaint were there in black and white. It is, we think, understandable that in all previous cases of this kind reliance has been placed on the transcript, because it is on the transcript that one will find interruptions and observations of the judge of the kinds referred to in *R. v. Clewer*, namely, those which prevent counsel from developing his case, and those which actively disparage the defence which is sought to be put up.

There is, in our judgment, a very important distinction between conduct on the part of the presiding judge which may be regarded as discourteous and may show signs of impatience – and, indeed, conduct which cannot be commended in any way – but which does not in itself invite the jury to disbelieve the defence witnesses, and conduct which positively and actively obstructs counsel in the doing of his work. The distinction is between that type

of case first mentioned and the type of case in *R. v. Clewer*, where there was an invitation by the judge to the jury to disregard what was being said and active, positive interference with counsel in the pursuit of his task.

We have considered the present case in the light of such guidance as we get from *R. v. Clewer*, and we are impressed by the fact that it is quite clear that these three witnesses are wrong in the first allegation which they make. It is quite clear that they are wrong in saying that there were frequent interruptions during the evidence, because that is not borne out by the transcript. It is equally clear that the learned chairman gave indications of impatience when counsel then appearing for the appellant Leggett announced his intention of going through all three cases again; and whilst the court would not for a moment wish to condone any impatience of a discourteous kind, if such there was in this case, the fact remains that there is nothing here to suggest at all that counsel was interrupted in his address in the sense that he was unable to develop to the jury what he wished to say; and certainly there is no suggestion that the learned chairman was disparaging the appellant, as opposed to the appellant's counsel. *If criticism by the learned chairman is a criticism of counsel in his handling of the case rather than of the case itself, it is obvious that the effect of that criticism on the trial and its outcome is very different from that which comes from a disparagement of the appellant himself.*

We have given this case careful consideration because it is an important matter, but we are quite satisfied that the kind of conduct spoken to in the evidence of the proposed witnesses – although conduct which, if properly described, we could not possibly condone – is nevertheless not conduct of the kind which would cause the conviction to be unsafe or unsatisfactory; and, therefore, not conduct which could possibly affect the outcome of the appeal. Accordingly, we refuse leave to call these witnesses, and in the result we must dismiss the appeal against conviction. (Emphasis added.)

Encik Karpal Singh argued that, unlike England, there is no contemporary transcript of a trial maintained in this country so that this court should be more ready to order the reception of evidence as to the conduct of a trial judge from persons who had first hand knowledge of the same. He submitted that the evidence when properly considered leaves no doubt that the learned trial judge had misconducted himself during the trial and had therefore deprived the accused of a fair trial. It was said that the accused had in consequence suffered grave prejudice.

In resisting the application, the learned deputy, Encik Azahar, cited to us the following passage appearing at para. 7-81 of the 1997 Edn of Archbold's *Criminal Pleading, Evidence and Practice*:

Interventions by the judge during a trial will lead to the quashing of a conviction: (a) when they have invited the jury to disbelieve the evidence for the defence in such strong terms that the mischief cannot be cured by the common formula in the summing up that the facts are for the jury, and that they may disregard anything said on the facts by the judge with which they do not agree; (b) when they have made it impossible for defending counsel to do his duty; (c) when they have effectively prevented the defendant or a witness for the defence from telling his story in his own way: *R. v. Hulusi and Purvis,* 58 Cr. App. R 378. In *R v. Barnes* 55 Cr. App. R. 100, Lord Parker CJ said: 'Just as interruptions by a trial judge, making it impossible for defending counsel to do justice to the defence, will result in a conviction being quashed so also conduct producing the same impossibility must have the same result' (at p. 107). In *Barnes,* the judge had put such pressure on the defendant to plead guilty that the relationship of confidence between counsel and defendant was destroyed, thereby gravely handicapping counsel in the presentation of the defence. In *R v. Matthews and Matthews,* 78 Cr. App. R 23, the Court of Appeal said that in considering the effect of interventions made by the trial judge the critical aspect of the investigation was the quality of the interventions as they related to the attitude of the judge as might be observed by the jury and the effect that the interventions had either on the orderly, proper and lucid deployment of the defendant's case by his advocate or on the efficiency of the attack to be made on the defendant's behalf on vital prosecution witnesses by cross-examination administered by his advocate on his behalf. Ultimately the question was: might the case for the defendant as presented to the jury over the trial as a whole, including the adducing and testing of evidence, the submissions of counsel and the summing up of the judge, be such that the jury's verdict might be unsafe? In *R. v. Jenkins* 83 Cr. App. R 152 CA, the judge had misrepresented the defence on two matters in summing up: this, taken together with the fact that he had seen fit 'in effect to take over the conduct of the trial and to enter into the arena in matters which could and should properly have been left to counsel' rendered the conviction unsafe.

It was submitted on the Public Prosecutor's behalf that the matters complained of in the present instance did not meet the legal test established by the authorities and summarised by the editors of Archbold in the passage earlier quoted.

After carefully considering the arguments advanced in support of and in opposition to the motion, we came to the conclusion that the evidence sought to be adduced did not meet the proper legal test that is to applied to a case as the present.

The evidence of the witnesses whom the accused wished to testify before us in essence concerns exchanges between the judge and Encik Gulam Mustaffa during the *voir dire* as well as the trial general in relation to the nature of the questions that were being put by counsel to certain witnesses for the prosecution. Although a number of press reports were relied upon, a careful examination of these reveals that they relate to the same incident. What appears to have happened is this. Counsel had asked a question under cross-examination which had already been answered by the witness concerned. Despite this, counsel pressed the witness for a fresh answer. The judge then appears to have asked counsel for the second and third accused not to repeat a question the answer to which had already been given, although it may not have been the answer sought by counsel. There was also an occasion when the judge told counsel for the second and third accused to ask direct questions of the first accused instead of beating about the bush. This was followed by what appears to be a heated exchange between counsel and the judge with the judge remarking that it was his court and counsel replying that it was the peoples' court.

It is clear that the matters complained of amount, in the words of Widgery LJ, in *Hircock (supra)*, to "a criticism of counsel in his handling of the case rather than of the case itself". Putting the fresh evidence at its highest, there was never at any time any risk to the accused either in their attack of the prosecution's witnesses or in the presentation of their defence.

The summing-up contains passages in which the learned judge took pains to direct the jury that they were the sole judges of fact and that they had to decide the case upon the whole of the evidence presented to them. It is clear to our mind that the matter was put beyond doubt by the learned judge's instruction that the jury was to hearken to the evidence before them and to nothing else. We are unable to see what more the judge could have done to instruct the jury in the circumstances of the present case.

There is an added feature in this case. It is this. When he came to sum up the case to the jury, the learned judge instructed them to the effect that they should ensure that the accused received a fair trial. This is not a usual direction to be found in an ordinary summing up to a jury. The judge probably so instructed the jury in order to sweep away from their minds any wrong impression (and we hasten to add that we are unable to perceive any in this case) that may have arisen by reason of the exchange between him and counsel for the second and third accused.

Furthermore, the record provided to us shows many pages thereof devoted to the cross-examination by counsel for the second and third accused both of the witnesses called by the prosecution as well as the co-accused. This puts paid to the contention now advanced before us that counsel for these accused was prevented from discharging the duty placed upon his shoulders. Indeed, we find that suggestion to be completely unfair to the trial judge and without basis.

We need not remind counsel who appear at first instance in criminal trials of their plain duty to courteously accept rulings made by the presiding judge and to assist in the conduct of the case rather than in its hindrance. Equally is it the duty of the judge to intervene and prevent the badgering of witnesses under cross-examination. When he does so, counsel may, of course, change his tack in such appropriate fashion as the situation demands and proceed with his task. But on no account must he confront the judge in a hostile and unbecoming manner.

Cases may occur where experienced counsel who sees the evidence going badly for his client, conducts himself in such a manner as to draw adverse criticism from the trial judge with a view of complaining that the ensuing exchange has deprived the accused of a fair trial. It is therefore of the utmost importance that this court acts with great care and restraint when entertaining applications that seek to put in issue the conduct of a trial judge. Unless the evidence sought to be adduced shows an attack by the presiding judge upon the accused's case rather than upon the attitude of counsel, this court should be very slow in the matter of reception of fresh evidence for the purpose of establishing the deprivation of a fair trial.

Having carefully considered the matter in its entirety, we find the criticisms levelled against the learned judge to be entirely unwarranted. We are satisfied that the learned judge did not exceed the role entrusted to him by law and that he acted with considerable restraint despite the grave provocation offered him. Indeed, we find him completely blameless for the episodes relied upon in support of the motion to adduce further evidence.

For these reasons, the motion to adduce fresh evidence was dismissed. With its dismissal, the second motion to add a new ground lacked the basis it required and was in consequence also dismissed. With that we now turn to the arguments advanced in support of the substantive appeals.

Complaints Of The First Accused

On behalf of the first accused, Encik Karpal Singh arguing with his usual ability raised several grounds of complaint which he said vitiated the trial and the conviction of his client. These may be conveniently summarised as follows:

(1) The jury were not given an opportunity to consider the weight to be given to the statement made by the first accused to the police after his arrest.

(2) There had been a misdirection as to the standard of proof at the close of the prosecution's case.

(3) There was wrongful admission of the discovery statements made by the first accused.

(4) The first accused's statement had been wrongly admitted in evidence.

(5) There was a misdirection on s. 304 of the Penal Code.

(6) There was a misdirection on the defence of insanity.

(7) There was non-direction on the prejudicial aspects of the case.

While we propose to consider each of these grounds, we find it convenient to address the fourth and first grounds of complaint together and in that order.

Admissibility And Weight Of First Accused's Cautioned Statement

(A) Admissibility

In order to appreciate the arguments of counsel it is necessary to state briefly so much of the facts and background as are relevant to the points at issue.

The first accused was arrested on 13 July 1993. At about 7pm on 24 July 1993, PW56 (ASP Mahpop bin Haji Jaafar), the officer in charge of investigations in this case, contacted ASP Latif bin Sitam (DP1 in the *voir dire*) at Jerantut Police Station. PW56 requested DP1 to record a statement from the first accused. DP1, on 25 and 26 July 1993, recorded the first accused's statement under the provisions of s. 113 of the Criminal Procedure Code ('the CPC'). That section reads as follows:

113. Admission of statements in evidence.

(1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that:

(a) no such statement shall be admissible or used as aforesaid

(i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence; and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which subsection (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him.

On the first day, there was a break for lunch following which the recording continued. It was concluded on the first day at about 5.50pm, after which the first accused was returned to the lock-up. The recording of the statement re-commenced on the second day (26 July 1993) at about 9.55am. Before

commencing the recording of the statement on each day, DP1 administered to the first accused the caution stipulated by s. 113 of the CPC. He also asked the first accused some questions. One of them was whether the first accused had received any threat, promise or inducement to make the statement. The actual words used by DP1 in Bahasa Malaysia were these:

> Adakah kamu telah menerima apa-apa pujukan, ugutan atau janji supaya kamu memberi percakapan kepada saya? (Emphasis added.)

The recording of the first accused's statement was concluded on the second day at about 12.40pm. PW56 received a copy of the statement (exh. P223) from DP1 on 26 September 1993.

In the course of the trial, the prosecution sought to admit exh. P223 in evidence as part of its case. The defence took objection on the ground of voluntariness. The judge then conducted the usual inquiry upon the issue of admissibility in the absence of the jury. The prosecution led evidence in discharge of the burden upon it by calling a number of witnesses. The first accused too gave evidence during the course of which he alleged that the statement (exh. P223) was extracted from him by the use of illegitimate and improper pressure. After hearing all the evidence upon the *voir dire*, including that given by the first accused, he decided in favour of voluntariness and admitted the statement. But he did not give written reasons for his decision. Further, the evidence produced during the *voir dire* was not repeated before the jury when the main trial re-commenced. There was no application by either side to do so and neither did the judge give a direction to that effect. However, when the accused gave evidence in his defence to the charge, he did not re-assert, in the presence of the jury, the allegations of improper pressure.

Encik Karpal Singh submitted that exh. P223 ought not to have been admitted in evidence because the prosecution had failed to prove that it was voluntary. Counsel argued that the manner in which exh. P223 had been recorded left much to be desired. There had been nothing more than the usual caution in the statutory formula. The questions that ought to have been asked of the first accused were simply not asked of him. In short, the recording officer failed to satisfy himself that the statement was being given voluntarily. Merely formal questions were put.

The recording officer (DP1) had used the expression "pujukan" to determine whether there had been any inducement. The proper word, it was suggested, was "dorongan" since that was the direct translation of "inducement" as found in the relevant dictionary.

It was also submitted that when recording of the statement re-commenced after the lunch break on the first day, DP1 ought to have put questions to the first accused to satisfy himself that the latter was giving the statement voluntarily.

Counsel argued that as against all this, the first accused had given positive evidence of illegitimate and improper pressure. He submitted that the learned judge was accordingly under a duty to give written reasons for his decision to admit the statement. At the very least, he should have told the jury why he admitted the statement.

With respect, we are unable to accept these submissions. But before we express our reasons for rejecting them, it may be useful to remind ourselves of the relevant principles that govern this area of the law.

Section 113 of the CPC is constructed in such a fashion as to render statements made thereunder admissible only if they are the product of a free mind, untainted by any threat, promise or inducement. We find such an interpretation to be warranted by the operation of proviso (a) (1) to the section. In *Birch v. Public Prosecutor* [1978] 1 MLJ 72, Syed Agil Barakbah J, (as he then was) when considering the effect of s. 37A of the Dangerous Drugs Ordinance 1952 which is *ipsissima verba* s. 113 of the CPC said (at p. 73 of the report):

> In the next ground, considerable time was spent by the learned Deputy Public Prosecutor and defence counsel on the construction of s. 37A of the Dangerous Drugs Ordinance. Since the learned President adopted the correct procedure in considering the two provisos (a) and (b), I do not propose to go into detail on the matter. All that I wish to point out is that a statement made under this section in relation to proviso (a) is in the nature of one made under s. 24 of the Evidence Act. (See *Chandrasekaran & Ors. v. Public Prosecutor* [1971] 1 MLJ 153, 158). The wordings in the two are in *pari materia.* In the inclusion of the proviso is the manifestation of the accepted standards of the rule of law incorporating ss. 24 and 25 of the Evidence Act and the judge's rules. Even though the caution has been administered, an accused person may still retract his statement under proviso (a) on any of the grounds stated therein in accordance with the well-accepted principles and practice. It is then the duty of the trial court to hold a trial within a trial in order to decide whether the statement appeared to be caused by any inducement, threat or promise. The duty of proving that the statement was voluntary is on the prosecution. If it is held by the trial court to be admissible, it becomes part of the prosecution case.

We would, with respect, accept *in toto* what his Lordship said upon that occasion. In our judgment, s. 113 of the CPC should receive like treatment. It follows, in our view, that cases decided under s. 24 of the Evidence Act 1950 or its equipollent in the Indian Evidence Act 1872 may safely be relied upon when interpreting proviso (a) (i) to s. 113 of the CPC because of the similarity in language between the two provisions.

It is trite law that the burden of proving the voluntariness of a statement made by an accused under s. 113 of the CPC lies upon the prosecution. The standard upon which that burden falls to be discharged is beyond a reasonable doubt, the test that is to be applied being partly objective and partly subjective. See Director of *Public Prosecutions v. Ping Lin* [1976] AC 574. It is equally trite that the only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that the statement was made involuntarily. As Sharma J, observed in *Public Prosecutor v. Law Say Seck* [1971] 1 MLJ 199, 201 when dealing with the admissibility of a confession under s. 24 of the Evidence Act 1950:

> I have been told that the use of the word 'appears' in s. 24 is very significant and the word 'proved' has purposely not been used by the legislature. I quite agree. A confession can, of course, be rejected on a valid ground or conjecture but there must be something before the court on which such a valid conjecture can rest. In this case I think there is sufficient evidence on which I can safely base a reasonably well founded belief in the hypothesis of a seeming inducement which avoids the confession under our laws. If the accused is able to point to some circumstances which arouse suspicion the confession cannot be admitted. A mere possibility that the confession was not voluntary is insufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence.

A statement recorded under the provisions of s. 113 of the CPC may also be held to be inadmissible if it was obtained through oppression as defined by Sachs J, in *R. v. Priestley* [1965] 51 Cr. App. R 1. See also *R. v. Prager* [1972] 1 WLR 260.

However, even where the defence succeeds in pointing to circumstances that bring into question the voluntariness of a statement obtained under s. 113 of the CPC the court may nevertheless hold it to be voluntary if, after properly appreciating the importance and significance of those circumstances, it finds that there are other facts and circumstances to completely assure the voluntariness of the statement. See *Irfan Ali v. State* [1970] Cri. LJ 603, 608.

A finding by a trial judge, whether sitting alone or with a jury, that a statement made under s. 113 of the CPC is voluntary is one of fact depending upon the facts and circumstances of each case. However, if the impugned finding has been reached without applying the true and legal tests and consideration of relevant matters, it is open to an appellate court to interfere. See, *Public Prosecutor v. Thum Soo Chye* [1954] MLJ 96; *Dato Mokhtar bin Hashim & Anor. v. Public Prosecutor* [1983] 2 MLJ 232, 273.

Where a trial is conducted before a judge and jury, questions of admissibility of evidence are for the judge alone. Therefore, the issue of voluntariness as a pre-condition to admissibility, whether of a confession under s. 17(2) of the Evidence Act 1950 read with s. 24 of that Act or of a statement under s. 113 of the CPC, is one within the sole province of the judge. It does not matter whether the accused denies having ever made the statement or admits making it involuntarily. The position remains unaltered. It is the judge alone who determines both issues upon the *voir dire*. We take these propositions to be well settled requiring no authority to be cited in their support.

Lastly, we accept as settled law that once a confession is admitted in evidence an accused may be convicted solely on its strength. However, as a matter of prudence and practice, the court ought to look for corroboration of the incriminating parts of the confession. See *Public Prosecutor v. Lai Pong Yuen & Ors.* [1968] 1 MLJ 12; *Public Prosecutor v. Chong Boo See* [1988] 3 MLJ 292; *Hasibullah bin Mohd Ghazali v. Public Prosecutor* [1993] 3 MLJ 321. For our part we regard the requirement of corroboration merely as another way of saying that a confession must not only be voluntary but also true. See *Abu bin Hussin v. Public Prosecutor* [1959] MLJ 5. For, truth is surely established by the presence of independent evidence that corroborates the incriminating parts of a confession.

With that we now turn to the arguments of counsel for the first accused. The first point taken is that DP1 had not satisfied himself that the statement was being made voluntarily before recording it. The short answer to this submission is that there is nothing in s. 113 of the CPC that calls for such satisfaction. This may be compared with s. 115(3) which deals with judicial confessions. The latter provision proscribes a magistrate from recording a statement or confession unless upon questioning the person making it he has reason to believe that it was made voluntarily. Such a prohibition is absent in s. 113. The legislature by the terms of the language employed has left the determination of the question of voluntariness to the court and not to the recording officer. On the facts of the present case we find nothing improper in the manner in which exh. P223 was recorded by DP1 or in the caution administered by him. Further, we do not find any shortcomings in the questions that were put by DP1 to the first accused after administering the statutory form of caution. We therefore find the first point to be lacking in merit.

We also find no merit in counsel's complaint that DP1 should have used the expression "dorongan" instead of "pujukan" to determine whether any inducement had been offered to the first accused to make the statement in exh. P223. The object of the questions put by DP1 was to ascertain whether there had been any inducement. The form of words actually used is unimportant. What is important is the sense that was meant to be conveyed. And we are entirely satisfied that the expression used by DP1 was sufficient in the circumstances of the present case to make it clear to the first accused that he was being asked whether he had been induced to make a statement.

We also find the complaint that DP1 ought to have questioned the first accused once again after the luncheon interval to ascertain whether there had been threat, promise or inducement offered during that period, to be lacking in merit. While it may be desirable for such a course to be taken, there was no necessity to undertake such an exercise afresh. In any event, it was not suggested by the first accused during his evidence on the *voir dire* that someone had approached him during the lunch break and applied illegitimate or improper pressure upon him to continue making the statement. At the end of the day, it was for the judge to take into account all the evidence before him and conclude one way or the other upon the issue of voluntariness. This he did.

But it is said – and this is the last point taken by counsel on the issue of voluntariness – that the judge should have put down in writing his reasons for admitting exh. P223 and thereby reveal the matters that operated upon his mind when he arrived at his decision. No authority was cited in support of this argument. We are certainly unaware of any on the point. As far as we are aware, there is no such practice adhered to in jury trials. And we are of the opinion that it is undesirable for a trial judge, sitting with a jury, to give reasons for admitting or rejecting a confession or other statement lest it be used before the jury, in which event an adverse impression may be formed by them on any matter dealt with by the judge in his written judgment. For much the same reason, it would be unsafe for a judge to inform the jury of his reasons for admitting the statement. In this context we can do no better than reproduce the words of Lee Hun Hoe CJ, (Borneo) in *Ramiah v. Public Prosecutor* [1986] 1 MLJ 301, 302:

> In the summing-up nothing was said about the caution statement. Having admitted it the learned judge should inform the jury that the caution statement was part of the prosecution case. It is their duty to consider the truth of the statement and the weight to be given to it.

In the present instance, the learned judge, in the course of his summing-up, informed the jury that he had admitted exh. P223. His direction upon it to the jury appears at p. 1047 of the record of appeal (p. 45of the summing-up). This is what he did. He quite properly drew the jury's attention to the fact that the first accused had, when testifying in his defence to the charge, admitted having made the statement in exh. P223. He also drew the jury's attention to the fact that the first accused's evidence on oath was along the same lines as his cautioned statement with some discrepancies between the two versions. He warned the jury of the danger of acting upon the first accused's confession in exh. P223 especially in respect of those parts that implicated the co-accused. He then invited the jury to carefully consider the first accused's confession and decide whether it was true. In our judgment, the direction by the learned judge on the point was entirely proper and sufficient in the circumstances of the instant case.

We have critically examined the whole of the evidence led in the trial within the trial in the light of the several criticisms addressed by counsel for the first accused. We are satisfied that any reasonable judge faced with the evidence produced during the *voir dire* would have held, as the learned judge in the present case held, that exh. P223 was voluntary, the product of a free mind, untainted by any illegitimate pressure.

That brings us to the next main ground of complaint addressed on behalf of the first accused.

(B) Weight

Exhibit P223 contains a vivid account of how the deceased came to meet his fate. In it the first accused describes how he attacked the deceased while the latter was lying flat on his back. He admits wielding an axe. He says that he hacked the deceased's neck three times repeatedly in order to sever the head of the deceased. He describes how he then cut up the body of the deceased into eighteen parts. He admits burying the decapitated remains in a hole in the ground that he had earlier dug and prepared. He says that he did all this at the behest of the second accused and in the presence of the third accused. The implication by the first accused of the other accused in the commission of the crime is a matter we will revert to later in this judgment. However, what is of moment is that the statement made by the first accused in exh. P223 amounts to a confession. It falls plumb within the terms of s. 17 of the Evidence Act 1950, in particular, s. 17(2) thereof. That provision reads as follows:

> 17(1) An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.
>
> (2) A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

After exh. P223 was admitted in evidence, the main trial proceeded in the presence of the jury. The evidence adduced during on the *voir dire* was not repeated before the jury. Neither the defence nor the prosecution moved for this to be done. The learned judge too did not invite counsel to pursue such a course. In consequence, the jury was deprived of an opportunity to hear all the evidence led during the trial within a trial. They were, of course, entitled to hear it for the purpose of deciding for themselves what weight, if any, they would attach to the first accused's confession.

The principle that governs this part of the case is well known. We will call it the rule in Yaacob. It is a reference to the case that settled the law in our jurisdiction, namely, the decision of the Federal Court in *Yaacob v. Public Prosecutor* [1966] 1 MLJ 67. There, Thompson LP formulated the rule as follows (at p. 68):

> The question of admissibility of evidence is for the judge and not the jury to decide (Criminal Procedure Code, s. 224(i)(a)). Where this calls for a decision as to whether the statement is free and voluntary a question of fact is involved and that question must be decided, like any other question of fact, on evidence. And to decide it the judge must listen not only to any evidence tendered by the prosecution but also to any evidence relating to the issue tendered by the defence, including if tendered the evidence of the prisoner, (see *R. v. Cowell* [1940] 2 KB 49). That evidence must be heard in the absence of the jury, (see *Chadwick* 24 Cr. App. R 138). The point is dealt with thus by Parker LCJ in the case of *Francis and Murphy* 43 Cr. App. R 174, 176:
>
> > It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th (1959) Edn of Archbold's *Criminal Pleadings*, etc., at paras. 1114 and 1115. 'The proper course,' it is said there, 'where objection is raised to the admissibility of an alleged confession, is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not.' The passage goes on to say that the evidence of the prisoner may be admitted at that stage. Then, if the evidence is admitted, 'the weight and value of a confession remain matters for the jury.' It is quite clear that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession.

From the proposition that the accused person is entitled to have the verdict of the jury on the weight and value of the confession it clearly follows that if the confession is admitted the jury should hear the evidence which thitherto the judge alone has heard. Then counsel for the defence should be allowed to cross-examine the prosecution witnesses over again in the presence of the jury and in due course, if so desired, to call the prisoner to repeat his evidence.

As was said by Lord Goddard in the case of *Murray*, 34 Cr. App. R. 203 (at p. 207):

> Its weight (of the confession) and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it has been obtained.

And his Lordship said a little later:

> This point, if there is any doubt about it, had better be settled once and for all. It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury, because if he can induce the jury to think that the confession has been obtained by some threat or promise or some means of that sort, then of course the value of the confession is enormously weakened. The weight of the evidence and the value of the evidence are always for the jury.

In our view in the present case there has been such a disregard of the ordinary way in which criminal proceedings are conducted that the conviction cannot stand. The question of the appellant's criminal responsibility is to be tried in the right and usual manner and that has not been done.

In *Muluk bin Ahmad & Anor v. Public Prosecutor* [1989] 2 MLJ 151, the prosecution adduced, as part of its case, a statement made by the accused Muluk under caution. That statement was admitted in evidence by the judge after holding a trial within a trial, in the jury's absence, to determine its admissibility. After the judge had ruled the statement admissible, counsel applied to recall before the jury all those witnesses who had testified upon the *voir dire*. The learned judge refused the request holding that it would be open for the accused to resort to do after the defence had been called. The accused were found guilty and convicted. They appealed. The Supreme Court in allowing the appeal and ordering a retrial applied its earlier decision in *Yau Sun Fatt v. Public Prosecutor* [1988] 1 MLJ 248. Lee Hun Hoe CJ (Borneo), said (at p. 152 of the report):

At p. 250 of *Yau Sun Fatt's* case it is explained thus:

> How could this be possible if the accused chose to remain silent when called for his defence, as the jury would not have heard his allegations. If the weight and value of the cautioned statement were matters for the jury then it is only right that they should be allowed to hear the allegations of the accused. The accused must be given the opportunity to be heard by the jury before being called upon to enter into his defence. As Lord Goddard said in *R v. Murray* 34 Cr. App R 203 at 207 concerning the confession:
>
> > Its weight (of the confession) and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it has been obtained.
>
> The truth of the confession is not directly relevant at the *voir dire*, but it will be a crucial question for the jury once the judge admits it.

It is only right to point out that the learned judge made the ruling in 1986 whereas *Yau Sun Fatt's* was decided in 1988. He chose the most convenient and time-saving course. That was also the course adopted by the learned judge in *Yaacob's* case. Nevertheless, it must be stressed that this court did not support the learned judge's interpretation of the words 'due course' in *Yaacob's* case to mean that the accused could give evidence in his defence and could repeat his allegations. This court made clear that once the cautioned statement was admitted 'the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned judge alone to testify again in the presence of the jury and that would include the accused. The procedure would mean that the accused would not have to wait until the defence is called.'

More recently, the Federal Court has re-stated the rule in *Yaacob* in affirming the duty cast upon a trial judge to ensure its compliance. In *Kiew Foo Mui & 2 Ors v. Public Prosecutor* [1995] 3 AMR 3111, 3118, Edgar Joseph Jr. FCJ, said:

> To return to *Yaacob*, we note that in that case, unlike the present case, counsel for the accused did, after the challenge to admissibility of the confession had failed, apply to call the accused to give evidence as to the circumstances in which it was obtained, but, the application was refused. Furthermore in *Yaacob*, unlike the present case, the jury were not told that in considering the question whether the confession was true, they were entitled to their opinion as to the way in which the confession was taken.

Be that as it may, we were of the view, that it is not merely of some importance but of fundamental importance to the administration of criminal justice that the accused person should feel that he has had a fair trial. Can it be seriously contended that just because of the mistake or blunder on the part of his counsel in omitting, after the challenge to admissibility of the cautioned statements had failed, to make application to the court for the recall of the prosecution witnesses to cross-examine them all over again – this time before the assessors – the prosecution were relieved of its duty of ensuring that these witnesses were recalled and examined in chief, once again, as to the circumstances in which the cautioned statements had been obtained and the defence then being given the opportunity to cross-examine them all over again, if they so wished? The answer to this question must surely be 'no' for, to hold to the contrary would be to reverse the onus of proof, with regard to the cautioned statements, which at all times, lay upon the prosecution. Nor, for that matter, could there be a waiver by the defence of such a requirement, unless the cautioned statement is exculpatory in nature and it is the defence, who seek its admission, in which case, no trial within a trial need be held at all. (See *PP v. Mohamed Noor bin Jantan* [1979] 2 MLJ 289; *PP v. Lin Lian Chen* [1992] 1 AMR 46:253; [1992] 2 MLJ 561.)

But, to return to the issue at hand, our enquiry had to be taken further, for we also had to consider what role (if any) the judge had to play in the context thereof and it is this topic which we must now address.

Having regard to:

(1) the failure of the prosecution in its duty to ensure, that once the challenge to the admissibility of the cautioned statements had failed, the entire evidence of the cautioned statements and the circumstances in which they had been obtained, would be given again, this time, in the presence of the assessors, and

(2) the failure of the defence to exercise their right to cross-examine all over again the prosecution witnesses, who had already testified on the *voir dire* in the absence of the assessors,

the next question to be logically considered was whether the learned judge remained under an automatic duty to remind the prosecution of its duty, and counsel for the defence of their corresponding right, as aforesaid.

In our view, the learned judge remained under such a duty since it is not just of some importance, but of fundamental importance to the administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset – namely, a fair trial, notwithstanding the shortcomings of his counsel. It is axiomatic that the primary duty of a judge at any trial – whether criminal or civil – is to ensure that justice is done, no doubt, according to law.

The Federal Court then went on to conclude that the breach of the rule in *Yaacob* had, on the facts before it, occasioned a miscarriage of justice.

In the present case it is common ground that there was non-observance of the rule in *Yaacob*. But it must at once be said in fairness to the learned judge that he did not have the benefit of the decision in *Kiew Foo Mui* when he admitted exh. P223. That decision came well after the trial in the present case had concluded. Before Kiew Foo Mui the rule in *Yaacob* was understood not to operate until and unless counsel had applied for a repetition before the jury of the evidence taken on the *voir dire*. In the present case there was, as we have already said, no such application. However, we have to decide the appeal of the first accused on the basis of the law as it stands, including the decision in *Kiew Foo Mui (supra)* which is clearly binding upon us.

It follows that the first accused; and, as will be later seen, the third accused; had withdrawn from her the operation of a rule that plainly operated in her favour. Ordinarily, in the absence of special circumstances, the first accused would be entitled to have his conviction set aside and an order of retrial made unless there was, in the circumstances of the case, no substantial miscarriage of justice. But Encik Karpal Singh submits that his client ought not to be subjected to a retrial because such a trial would be conducted before a single judge, the jury trial provisions in the CPC having since been repealed. These are important questions which we will address later in this judgment. For the moment we must deal with the other complaints of the first accused.

Misdirection On Standard Of Proof

The second ground of complaint relates to what the learned judge said at the close of the prosecution case. He repeated it in his summing-up to the jury. In effect what the learned judge said was that the prosecution had adduced sufficient evidence at the close of its case upon which he was satisfied that a *prima facie* case had been established against all three accused showing that they had committed the crime with which they were charged. He went on to say that if the accused had elected not to give evidence the court would have had to convict them.

Encik Karpal Singh submitted that the learned judge's direction was not in accordance with the terms of s. 214 of the CPC which makes the following provision:

214 When court may direct a verdict of not guilty.

(1) When the case for the prosecution is concluded the court, if it considers that there is no evidence that the accused committed the offence, shall direct the jury to return a verdict of not guilty.

(2) If the court considers that there is evidence that the accused committed the offence the court shall call on the accused to enter on his defence.

(3) The jury may return a verdict of not guilty either unanimously or by a majority at any time after the conclusion of the evidence for the prosecution if they consider the case to be one in which they could not safely convict.

Counsel submitted further that the learned judge's direction was more in line with the provisions of s. 180 of the CPC before its amendment. It was contended for the first accused that the learned judge had imposed a higher burden than that required by law and that he had therefore misdirected the jury.

We are however in agreement with Encik Azahar, the learned deputy, that no prejudice whatsoever was occasioned to the first accused, or indeed the other accused, by the judge's direction. In our judgment, the learned deputy is correct in his argument that the learned judge was entitled to call upon the accused to enter upon their defence if there was some evidence. By requiring the prosecution to meet a higher standard, the prejudice, if any, was visited upon them and not upon the accused. We are therefore of the view that there is no merit in the submissions made by Encik Karpal Singh on this ground of complaint.

With that we turn to examine the third ground of complaint advanced on behalf of the first accused.

Admission Of The First Accused's Discovery Statements

It was submitted that the learned judge had wrongly admitted the first accused's discovery statement under s. 27 of the Evidence Act 1950. In order to properly appreciate the nature of this complaint it is necessary to recount some of the facts relevant to this part of the case.

As we had earlier observed, the first accused was arrested on 13 July 1993. On 22 July 1993, at about 12.15am, PW56 (ASP Mahpop) questioned the first accused. During this interrogation the first accused gave PW56 the following information:

Mayat ada di tanam dalam stor belakang rumah dan saya boleh menunjukkan kepada Encik.

Armed with this information, PW56, accompanied by the first accused and police personnel, proceeded to the house occupied by the three accused persons. Having entered the store, the first accused pointed with his jaw in the direction of the floor. From the place pointed by the first accused were recovered several parts of the deceased's body. But the head was missing. PW56 then asked the first accused where he had kept the axe with which he had severed Dato Mazlan's head. The first accused at once brought PW56 to a place behind the store at the premises and said: "Di sini saya tanamkan kepala." When questioned by PW56 as to the whereabouts of the deceased's pistol, the first accused replied that it was buried near the wall. It is beyond dispute that in consequence of these pieces of information given by the first accused, the various severed parts of the deceased's body, an axe which was said to be the murder weapon, other weapons as well as the deceased's pistol were recovered.

Encik Karpal Singh argued that the several pieces of information given by his client to PW56 were all inadmissible. They were produced by a mind that had been subjected to improper and illegitimate pressure and were entirely involuntary and ought therefore to be excluded. In any event, a trial within a trial should have been held to determine their admissibility. Reliance was placed by counsel on the decision of the Federal Court in *Md. Desa bin Hashim v. Public Prosecutor* [1995] 3 MLJ 350 in support of these arguments.

It must be borne in mind that unlike *Md Desa's* case, the information given by the first accused in the present case did not amount to a confession. Furthermore, in the present case, unlike *Md Desa's* case, there was no challenge taken when the impugned pieces of information were adduced in evidence. If it was the first accused's case that the information he gave had been extorted from him under threat or duress, it was the duty of his counsel to have objected to their admission. It is too late in the day to now argue that the information was given in consequence of any threat, promise or inducement. It is noteworthy that when the first accused came to give evidence in his defence, he admitted giving the several pieces of information earlier adduced in evidence.

In the light of these matters, we are in agreement with the learned deputy that the information given by the first accused to PW56 were rightly admitted under s. 27 of the Evidence Act 1950. It follows that the summing-up of the learned judge does not contain any error in this respect.

Failure To Direct On Section 304

It was submitted by counsel for the first accused that there was insufficient direction by the learned judge to the jury on the issue of culpable homicide under s. 304 of the Penal Code. The point taken is that the judge ought to have told the jury of the possibility of their returning a verdict of culpable homicide not amounting to murder.

Now, the question whether a judge ought to direct the jury on the possibility of an alternate verdict under s. 304 depends upon the nature of the evidence in a particular case. If there is, in a given case, some evidence, however weak, that would bring into operation one or more of the exceptions to murder, the judge is duty bound to leave it to the jury with an appropriate direction on the point. Absent such evidence, a judge is under no duty to direct the jury upon the issue. As Syed Agil Barakbah SCJ said in *Teoh Seng Lian v. Public Prosecutor* [1986] 1 MLJ 474, 475:

> Now, it is the general principle of law for a judge sitting with a jury to put to them any defence available on the evidence irrespective of whether or not reliance has been placed on that defence at the trial or whether or not it has been mentioned by the counsel at the trial. The way in which it is to be complied with is a matter for the trial judge to decide basing on the actual evidence adduced at the trial (see *Loo Geok Hong v. Public Prosecutor* [1961] MLJ 157). *By available defence it does not mean each and every defence that is mentioned in the Penal Code but possible defences arising from the evidence that become necessary in the circumstances to be put to the jury in order to enable them to reach a proper and just verdict.* (Emphasis added.)

In the present instance, there is no evidence whatsoever to suggest the availability of any of the exceptions appearing under s. 300 of the Penal Code. It follows that there was no duty whatsoever on the learned judge to include in his charge to the jury a direction upon the point.

With that we turn to Encik Karpal Singh's sixth point.

Defence Of Insanity

The trial of the accused commenced before the High Court on 12 September 1994. On 7 October 1994, at the conclusion of the proceedings for the day, the learned trial judge adjourned further hearing to 17 October 1994. His note shows that after he adjourned the trial, the learned judge, upon the application of counsel for the first accused (not Encik Karpal Singh) ordered the first accused to be sent to the General Hospital, Kuantan for observation. The record also reveals that when the trial resumed on 17 October 1994, all three accused were present in court. Thereafter nothing was said by anyone about the first accused's visit to the Kuantan General Hospital and the trial proceeded to its conclusion.

In support of the plea of insanity the first accused gave evidence to the effect that he was at all material times completely unaware of what he was doing. He was in the grip of some sort of spell. His mind was not alive to the fact that he was killing the deceased. It was only after his arrest, at the police station, when the second accused placed a hand on his shoulder, that he woke up from a trance. That, in a summary, is his story.

The learned judge directed the jury that the evidence relied upon by the first accused did not amount to insanity in law. He told them that it merely raised a plea of diminished responsibility, which is not known to our law.

Based on these matters, Encik Karpal Singh made two submissions. First, he submitted that the trial had been vitiated for non-compliance with ss. 342 and 343 of the CPC. His second submission is that the learned judge's direction to the jury on the issue of insanity was wholly wrong. We will now deal with each of these submissions.

In order to appreciate the first submission, it is necessary to hearken to the words of ss. 342 and 343 of the CPC. These sections provide as follows:

342. Procedure when accused is suspected to be of unsound mind

(i) When a judge holding a trial or a magistrate holding an inquiry or a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness.

(ii) At such investigation it shall not be necessary for the accused person to be present and the judge or Magistrate may receive as evidence a certificate in writing signed by a Medical Officer to the effect that such accused person is in his opinion of unsound mind or is a proper person to be detained for observation in a mental hospital, or such judge or magistrate may, if he sees fit, take oral evidence from a Medical Officer on the state of mind of such accused person.

(iii) If not satisfied that such person is capable of making his defence, such judge or magistrate shall postpone the inquiry or trial and shall remand such person for a period not exceeding one month to be detained for observation in any mental hospital wheresoever in the Federation established.

(iv) The Medical Superintendent of the said mental hospital shall keep such person under observation during the period of his remand and before the expiry of such period shall certify under his hand to the court his opinion as to the state of mind of such person, and if he is unable within the

period to form any definite conclusion, shall so certify to the court and shall ask for a further remand. Such further remand may extend to a period of two months.

(v) The Public Prosecutor may at any stage of any proceedings prior to the trial order that any accused person whom he suspects to be of unsound mind be sent to a mental hospital for observation for a period not exceeding one month. The Medical Superintendent of such mental hospital shall keep such person under observation during the said period and before the expiry of the said period shall certify under his hand to the Public Prosecutor his opinion as to the state of mind of such person. If the said Medical Superintendent is unable within the said period to form any definite conclusion he shall so certify to the Public Prosecutor, and the Public Prosecutor may order such person to be detained in such mental hospital for a further period not exceeding two months. The Medical Superintendent of a mental hospital may, notwithstanding anything in the Mental Disorders Ordinance 1952, contained, detain any accused person in respect of whom on order has been made under this subsection for a period not exceeding the period specified in such order.

343. Certificate of Medical Superintendent.

(i) If the Medical Superintendent shall certify that the accused person is of sound mind and capable of making his defence the judge or magistrate shall proceed with the inquiry or trial, as the case may be.

(ii) If the Medical Superintendent shall certify that such person is of unsound mind and incapable of making his defence the court shall, if satisfied of the fact, find accordingly, and thereupon the inquiry or trial, as the case may be, shall be postponed.

(iii) The certificate of the Medical Superintendent shall be receivable as evidence under this section.

(iv) If the accused person is certified to be of unsound mind and incapable of making his defence it shall not be necessary for him to be present in court during proceedings under this section.

Counsel argues that once his client was sent to Kuantan General Hospital, it was incumbent upon the learned judge to postpone the trial pending the receipt of the certificate of the Medical Superintendent. It is counsel's contention that the trial in the instant case was a nullity because the mandatory provisions of the foregoing two sections had not been complied with.

With respect, the short answer to counsel is to be found in the opening words of s. 342. They are, so far as relevant to the instant appeal: "When a judge holding a trial ... has reason to suspect that the accused person is of unsound mind". In the present case, there was absolutely no material before the judge to raise a reasonable suspicion about the soundness of the first accused's mental state. Counsel having made the application to place the first accused under observation was clearly under a duty to pursue the matter to its logical conclusion. Once there was a marked silence on his part, the judge was entitled to safely assume that the matter was not being seriously pursued any further. And it must be said that as events transpired, the learned judge would have been entirely correct in making such an assumption. For, the answers given by the first accused under cross-examination as well as the contents of his cautioned statement (exh. P223) put beyond any doubt the absence of any mental illness on his part.

In support of his second submission Encik Karpal Singh cited *Ashiruddin Ahmed v. R.* [1949] 50 Cr. LJ 255. We do not find a discussion of that case to be necessary. All we need say is that the facts there are readily distinguishable from those of the present case.

We are, on the other hand, entirely in agreement with the submission made by the learned deputy, Encik Azahar, that the burden of establishing the defence of insanity lay upon the first accused (see *Public Prosecutor v. Alang Mat Nasir* [1938] MLJ 153; *Jusoh v. Public Prosecutor* [1963] MLJ 84) and that he had plainly failed to do this. The learned deputy drew our attention to the absence of any cross-examination of the prosecution witnesses on the insanity issue. We were also referred to passages in the evidence-in-chief of the first accused where he clearly explains the premeditation with which the murder of the deceased had been planned and executed. We are in agreement with Encik Azahar that the revelations made by the first accused are the product of a mind uninfected by any illness of any sort.

In our judgment the learned judge was entirely correct in directing the jury as he did. There was absent before him any evidence which supported the plea of insanity. We are therefore of the view that there is no merit in the complaint made on the point.

Prejudice To The Accused

The last point taken on behalf of the first accused is that the learned judge did not sufficiently direct the jury not to be moved by the blood and gore which the case involved. In particular, the judge should have told the jury not to be moved by emotion by the photographs of the dismembered body of the deceased introduced by the prosecution in evidence. His failure to direct the jury accordingly resulted in prejudice to the first accused. So the argument goes.

We have no difficulty in dissenting from these submissions. There is no doubt on the evidence that the deceased is dead and that the first accused killed him. The way in which the crime was committed and the deliberate manner in which the body was dismembered to facilitate burial are matters which the jury were surely entitled to take into account when determining whether the killing was done with the proscribed intention. Any direction that had the effect of watering down the seriousness of the crime would have been a serious misdirection, as it would have required the jury to exclude matters that lay squarely within their domain. The judge, in our view, was entirely correct in refusing to direct the jury along the lines suggested by Encik Karpal Singh.

Summary Of First Accused's Appeal

All the points, save one, taken on behalf of the first accused in support of his appeal are, in our view, devoid of any merit. The breach of the rule in *Yaacob* is the only point of any substance. Since the identical argument was raised in support of the third accused's appeal, we think it best to reserve our views upon it until after considering the appeals of the other two accused.

We must now turn our attention to the appeals of the second and third accused.

Complaints Of The Second And Third Accused

Encik Gulam Mustaffa, who appeared for the second and third accused in the court below and in this court, while adopting the submissions of Encik Karpal Singh made specific complaint of the following matters on behalf of his clients:

(1) The misdirection on the issue of the first accused's insanity had seriously prejudiced the second and third accused.

(2) The learned judge was wrong in holding the third accused's cautioned statement to be voluntary and in admitting it in evidence.

(3) Even if the judge was right in admitting the third accused's cautioned statement, he was wrong in not keeping out those parts of it that related matters that were purely prejudicial to her case.

(4) The judge did not observe the rule in *Yaacob*. He did not properly leave to the jury, the weight that was to be attached to the third accused's statement.

(5) The learned judge misdirected the jury on the application of s. 30 of the Evidence Act 1950 against the second and third accused.

(6) The learned judge misdirected the jury on the law relating to s. 34 of the Penal Code.

(7) The learned judge did not properly direct the jury on the law governing circumstantial evidence. In any event, the evidence of circumstances in the present case contained explanations within it and was therefore insufficient to support the prosecution's case. The judge did not properly instruct the jury on this aspect of the case.

(8) The learned judge did not sufficiently draw the jury's attention to the contents of the second accused's cautioned statement, resulting in serious prejudice.

(9) The learned judge did not sufficiently direct the jury on the weight to be attached to the unsworn statement of the third accused given in her defence.

The Insanity Point

The argument here is that if, as contended, the defence of insanity was available to the first accused, there could be no question of the second and third accused having acted in furtherance of a common intention. Since the first accused would not be in a position to form any sort of intention, the second and third accused could not be found to have acted in furtherance of a common intention with the first accused.

Now, we have already upheld the learned judge's direction on the issue of the first accused' s defence of insanity. Since the first accused had not succeeded in bringing himself within the terms of s. 84 of the Penal Code, the point is no longer open for argument by the second and third accused. But there is a more important reason for rejecting Encik Gulam's argument.

As we earlier observed, the first accused's version was that he was under a spell and was not conscious about what he was doing at the material time. This version was attacked by counsel for the second and third accused during his cross-examination of the first accused. It was put to the first accused by Encik Gulam that his story was a blatant falsehood. It was also put to the first accused that he was not suffering from any infirmity of mind because of his ability to recall in detail all that transpired on the night that the deceased met his end. In other words, the second and third accused were not prepared to accept the first accused's claim that he had been in a zombie like state when he attacked and killed the deceased. In these circumstances, it is not open to the second and third accused to argue in favour of the first accused's insanity.

Admissibility And Weight Of Third Accused's Cautioned Statement *a*

We will now address the second, third and fourth grounds of complaint advanced on behalf of the third accused. The factual matrix against which her arguments fall to be considered are as follows.

The second and third accused were arrested on 20 July 1993. On 14 August *b* 1993 a statement under caution was recorded from the third accused by DSP Takbir Ahmad (PW57) who was, on the prosecution's own evidence, deeply involved in the investigation of the crime in question. The prosecution sought to adduce the statement in evidence. The defence objected to its admission. A trial within a trial was held to determine admissibility. After hearing all *c* the evidence adduced on the *voir dire* the learned judge admitted the third accused's cautioned statement. It is exh. P228. According to the prosecution's evidence, this is how exh. P228 came to be recorded.

On 12 August 1993, the third accused was escorted from the Police *d* Headquarters at Bukit Aman to the Jalan Travers police station. Three police personnel accompanied her. One of them was Lance Corporal Noraini Yaakob (DP1 in the trial within a trial). During the journey, the third accused told DP1 that she wished to meet with P.W. 57 as soon as possible. Her purpose was to relate to PW57 the manner in which Dato Mazlan met his end. The *e* third accused repeated her request after arrival at the police station. Her message was relayed to PW57 who then had the third accused brought before him. Two meetings took place. The first was on 13 August 1993. The second took place on the following day. A policewoman was present at both meetings.

According to the prosecution's evidence, at the first of these meetings the third *f* accused expressed her wish to tell PW57 her version of the events that resulted in the death of Dato Mazlan. Despite an offer by PW57 to have her statement recorded by another officer the third accused insisted on telling her story to PW57. Thereafter, PW57 administered to the third accused the caution prescribed by s. 113 of the CPC. The third accused then proceeded to recite *g* the events leading up to the death of Dato Mazlan. PW57 listened to all that the third accused had to say although he did not reduce the statement into writing. At the second meeting, PW57 once again administered the statutory caution and proceeded to record in detail the statement made by the third accused. After having completed the recording the third accused, at the request *h* of PW57, signed her statement. PW57 testified that the third accused gave her statement (exh. P228) of her own free volition.

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The third accused during her evidence on the *voir dire* admitted that the two meetings she had with PW57 were at her behest. However, she denied having made any statement whatsoever on either occasion. According to her, the conversation she had with PW57 on both occasions was purely social in nature with no reference whatsoever to the circumstances in which Dato Mazlan was killed. PW57 had merely asked her to sign some blank pieces of paper and she obliged. Her allegation in substance therefore is that the statement contained in exh. P228 is the product of PW57's imaginative mind. There was, however, no allegation of any improper pressure made by the third accused against PW57 in connection with the recording of the statement.

Before us, Encik Gulam Mustaffa argued that the admission by the learned judge of P228 in evidence was against the weight of decided authority. The learned judge, it was submitted, ought to have excluded the statement (exh. P228) because it had been recorded by an officer who was closely associated with the investigation of the crime with which the third accused was charged. Counsel cited *Lee Look v. Public Prosecutor* [1985] 1 MLJ 240, 241 where Gunn Chit Tuan J, (as he then was) said:

> Having perused the recorded evidence, I was satisfied and agreed with learned counsel for the defence that the investigating officer (PW2) was definitely involved in the investigation of this case so that there was likelihood of bias on his part. The former Court of Appeal in *Cheong See Leong v. Public Prosecutor* [1949] MLJ 67 has held, *inter alia,* that the principle that a judicial officer who is interested in a case should not sit to adjudicate upon it applies in regard to interpreters. In that case, the former Court of Appeal also held that the use of the Detective Sergeant, who was fully conversant with the material facts and was subsequently called by the prosecution as their principal witness to prove those facts, as an interpreter in taking the statement from the appellant in that case, offended against the elementary ideas of justice and therefore no reliance could be placed on the accuracy of that statement. Similarly in this case following the former Court of Appeal's decision in that case, I considered that the use of the investigating officer, who was actively involved in the investigation of the case and who was subsequently called by the prosecution as a witness, as a recording officer in taking the cautioned statement from the appellant resulted in the likelihood of bias on his part. In the circumstances the learned President should have as a matter of law and fact held that the cautioned statement was inadmissible in evidence as it might result in a miscarriage of justice.

We accept all that was said by his Lordship on that occasion as representing the general principle governing the recording of cautioned statements by police officers. However, it must be noted that the cases in which the principle has been applied with full rigour are readily distinguishable from the present

appeal. In *Lee Look (supra)*, for instance, the decision that an officer intimately connected with the investigation should record the cautioned statement was that of the investigating authority. In the present instance, however, the decision that PW57 shall record exh. P228 was that of the third accused and not any police officer. She knew PW57 and that is probably the reason why she must have felt comfortable in relating her story to him.

The suggestion that exh. P228, consisting of thirty three hand written pages was manufactured by PW57 is one which, in our judgment, would be looked at askance by any reasonable jury. There is no material in the appeal record to show the reason for PW57 to fabricate the third accused's statement. Exhibit P228 contains vivid details as to the events in question which only a person concerned in the commission of the crime would have known. Having carefully scrutinised the record provided to us, we would, with respect, uphold the decision of the learned judge to admit exh. P228 in evidence.

The third accused's cautioned statement (exh. P228) sets out in great detail the circumstances in which Dato Mazlan was killed. When properly construed as a whole it amounts to a confession under s. 17(2) of the Evidence Act 1950. However, exh. P228 also contains a narration of other matters which, strictly speaking, are not relevant to the charge framed against the third accused. These matters amount to similar fact evidence upon which no reliance was necessary for the prosecution to establish its case. They therefore amount to purely prejudicial evidence.

After he had ruled the third accused's cautioned statement to be admissible, the learned judge, at the invitation of the prosecution, directed that the prejudicial portions of exh. P228 be kept away from the jury. However, at a later stage of the trial the whole of exh. P228, including the portion containing the prejudicial evidence, was made available to the jury. Encik Gulam has argued that this was wrong.

The English Court of Appeal had occasion to deal with the point in *R. v. Weaver* [1967] 1 All ER 277. Sachs LJ there said (at p. 279):

> [T]he court recognizes that, according to current practice, appropriate steps are taken in certain circumstances to avoid some fact prejudicial to the accused being mentioned. Thus the statement by the accused may be edited to avoid prejudicing the accused, an effort being made to eliminate things which are part of the evidence but which it is thought better that the jury should not know. The best way for this to be done is for the evidence to appear unvarnished in the deposition taken before the magistrate; then at the trial counsel can confer and the judge can, if necessary, take his part in the matter to ensure that, if any editing is done, it is done in the right way and to the right degree.

Encik Yusof, the learned deputy, submitted that the question whether a cautioned statement should be edited to exclude parts that are prejudicial to an accused must be resolved according the facts and circumstances of each case. He has argued that there may be cases where to blank out certain parts of a cautioned statement may cause greater harm than to allow the whole of it to go into evidence. We agree with this submission.

In our opinion, great caution must be exercised in adopting English practice to jury trials in this country. For it is important to bear in mind that a jury at the Central Criminal Court or at any of the English assizes may not be readily equated with seven persons sitting in the jury box in the High Court at Temerloh. It was for the learned trial judge, faced with the particular difficulty, to deal with the matter in such a way to ensure that the accused receives a fair trial and that the ends of justice are met. How that is to be achieved in any given case is a matter for the trial judge to decide. And this court should be slow to interfere with his decision upon such a matter, unless, of course, it is shown that the particular course resorted to by a trial judge has resulted in a substantial miscarriage of justice.

In the present instance, the learned judge, having decided to permit the whole of exh. P228 to be placed before the jury warned them not to pay any heed to the prejudicial evidence contained in it. The terms upon which he directed the jury on the whole case and the warning he gave them on this aspect of the evidence leaves us in no doubt whatsoever that fairness was achieved in favour of all the accused and in particular the third accused. In our judgment the learned trial judge's warning to the jury to exclude from their minds those portions of exh. P228 that were purely prejudicial was sufficient in the circumstances of the case. We are therefore of the view that the complaint made by the third accused on this point is without merit.

So far as weight is concerned, it is true that the evidence led in the trial within the trial was not repeated before the jury. The rule in *Yaacob* was therefore not observed. We do not accept the contention of the learned deputy that the rule in Yaacob does not operate on the facts of this case. The mere fact that the allegation here was that the statement was never made does not take the case outside the operation of the rule. In our judgment, the decision of the former Court of Appeal in *Abu bin Hussin v. Public Prosecutor (supra)* puts the matter beyond argument. However, the effect of the omission to observe the rule in *Yaacob* is a matter we shall address later in this judgment.

Use Of Co-accused's Confession

We now turn to the complaint by counsel for the second and third accused that the learned judge misdirected the jury on the application of s. 30 of the Evidence Act 1950. The section reads:

> 30. When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.

The way in which the section must be applied has been fairly worked out in the decided cases. The evidence against an accused must be first marshalled, putting aside the confession of the co-accused. If the court is prepared to convict on the other evidence, it may pray in aid the co-accused's confession to lend assurance to the conclusion of guilt already arrived at. As observed by Raja Azlan Shah LP in *Public Prosecutor v. Nordin bin Johan & Anor* [1983] 2 MLJ 221, 222:

> Section 30 provides that this statement may be taken into consideration against the 2 respondents but on the decided authorities the prerequisite to this is that there must be some cogent evidence against them quite apart from the statement of the 3rd accused. The nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must *ex necessitate rei* be a factual matter in the context and circumstances of the particular case.

In the instant case, the learned judge's summing-up when read as a whole makes it abundantly clear that the jury were instructed in clear terms that they should consider the evidence apart from the confession. At one stage of the summing-up, the learned trial judge pointed out that the prosecution had adduced sufficient evidence to establish the charge, after putting aside the confessions of the first and third accused. He went on to say that the jury was at liberty to disregard his views on the evidence if they were not in agreement with the views expressed. He also warned the jury on the danger of acting on the confession of a co-accused. We are satisfied that there was in the circumstances of the present case a proper direction on s. 30. We accordingly find no merit in this ground of complaint.

Common Intention

The law governing criminal liability under s. 34 of the Penal Code was explained by Hashim Yeop A. Sani J, (later CJ (Malaya)) in *Dato Mokhtar bin Hashim & Anor. v. Public Prosecutor* [1983] 2 MLJ 232, 267 as follows:

> Under s. 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case. See *Mahbub Shah v. King Emperor* [1945] LR 72 IA 148, 153. The doctrine of common intention is as expressed in s. 34 of the Penal Code itself which reads:
>
> > When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone
>
> It is also a common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined.
>
> Thus it is clear that the leading feature of s. 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirements of s. 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physica1 presence? Even passive participation may require physical presence.

Having carefully scrutinised the summing-up of the learned trial judge, we are unable to agree with the argument of counsel that the jury was misdirected on the issue of common intention. Indeed, we are satisfied that the learned trial judge's direction on the point was entirely adequate in the circumstances of the case. Accordingly, we reject the sixth ground of complaint advanced on behalf of the second and third accused.

Circumstantial Evidence

We now turn to deal with the complaints directed at the evidence of circumstances adduced by the prosecution. The argument here is two pronged. First, it is contended that the learned judge misdirected the jury on the law governing circumstantial evidence. Second, that the circumstantial evidence in the present case was of such quality that no reasonable jury, properly directed, would have convicted the accused upon its strength.

We are of the view that there is no merit in the first limb of the argument. The learned judge, in the course of the summing-up took exceptional care to explain to the jury the nature of circumstantial evidence. He gave to the jury the well-known passage in the judgment of Thomson CJ (as he then was) in *Chan Chwen Kong v. Public Prosecutor* [1962] MLJ 307. We do not consider that any particular form of words is necessary to convey to the minds of the jury the burden that lies upon the prosecution when it relies on circumstantial evidence to establish its case. The proposition that circumstantial evidence must, when taken together, irresistibly lead to the conclusion that the accused committed the offence is merely another way of saying that the prosecution must prove its case beyond a reasonable doubt. This is because any gap in the circumstances relied upon or an interpretation of them that reasonably leads to an alternative conclusion inconsistent with guilt would result in the prosecution not having proved its case beyond a reasonable doubt. See, *Jayaraman & Ors v. Public Prosecutor* [1982] 2 MLJ 306. In the present case we are unable to find any misdirection by the learned judge on the law governing the appreciation of circumstantial evidence.

We also find no merit in the second limb of the argument under this head of complaint. In our judgment there was sufficient admissible evidence before the jury which, if believed, would establish the offence with which the accused were charged. The learned deputy, Encik Yusof, carefully took us through the several pieces of evidence that incriminated the accused persons in the commission of the offence.

First, there is the fact, already alluded to, that the decapitated body of Dato Mazlan was recovered from the house at Ulu Dong occupied by the three accused. Second, it was proved that Dato Mazlan's death was caused by the severance of his head by a weapon similar to the axe (exh. P14) recovered at the same premises. Third, on 2 July 1993, Dato Mazlan withdrew about RM300,000 from his bank accounts. Fourth, he was last seen alive in his car with the second accused, heading in the direction of the house occupied by the accused persons. Fifth, at about 1am on 3 July 1993, PW5 heard Dato Mazlan's car leaving the house at Ulu Dong. At about 3am on the same

morning, the second accused and one other person checked into the Plaza Hotel at Kuala Lumpur. Sixth, between 3 July 1993 and 18 July 1993, the second and third accused embarked on a spending spree. During this period they spent more than RM200,000. Of this sum, about RM160,000 was spent on the morning of 3 July 1993. Payments by the second and third accused were made in RM1,000 notes, which is the same denomination in which Dato' Mazlan had earlier withdrawn his money. Seventh, the second accused was with Dato Mazlan shortly after the latter had made the withdrawal from his banks and shortly before he disappeared. Eighth, there is no quarrel that Dato' Mazlan met his death in the hands of the first accused in the late hours of 2 July 1993 at the house occupied by the three accused persons. Ninth, the second and third accused persons were in financial straits before 3 July 1993. The second and third accused claimed that they had sold to Dato' Mazlan a walking stick, songkok and talisman alleged to possess magical powers for a sum of RM2,000,000. They also claimed that they had earlier received RM500,000 from Dato Mazlan as part payment for this sale. If these allegations were true, the question arises as to why the second and third accused did not go on a spending spree earlier than 3 July 1993. Tenth, the second accused had Dato' Mazlan's identity card or NRIC in his possession. He gave this card to PW39 on 9 July 1993 for the purpose of selling Dato' Mazlan's car. Eleventh, the third accused was in possession of Dato' Mazlan's watch, which she gave to her brother (PW28) on 5 July 1997. Twelfth, the first and second accused checked out of Plaza Hotel on 4 July 1997 and on the same day checked into Park Royal Hotel. However, they left Dato' Mazlan's car in the basement car park of the Plaza Hotel. It certainly suggests an attempt on their part to distance themselves from the disappearance of Dato' Mazlan. But there was no explanation from either accused for this act of abandonment. Thirteenth, on 8 July 1993, the second and third accused together with PW28 proceeded to the house at Ulu Dong in a limousine hired by the second accused and driven by PW39. At Ulu Dong, the second accused told PW39 that he had bought the land on which the house stood in order to develop it into a resort. The third accused then informed PW28 that she and the second accused had recently purchased the land. These two statements were far removed from the truth, which was that the land in question belonged to Dato' Mazlan. Fourteenth, on the return journey from Ulu Dong to Kuala Lumpur, the second accused, in the presence of the third accused and PW28, asked PW39 of the possibility of selling a car which belonged to a friend, a Dato, who had lost heavily at the gaming tables. The second accused went on to say that the Dato in question had borrowed money from him (the second accused) and wished to repay it by selling his car. On the following day, that is to say, 9 July 1993, the second accused, the third accused and PW39 were in Room 2005

at the Park Royal Hotel. That room was, at that time, under occupation by the second and the third accused. The second accused then informed PW39 that the Dato earlier refused to meet anyone concerning the sale of his car because he was ashamed at having lost his fortune at gambling. All these statements were false because the car in question belonged to Dato' Mazlan who was already dead. Fifteenth, the body of Dato' Mazlan was buried in a hole in the ground soon after he was killed. The hole must have already been dug earlier because it is highly improbable that a hole so large was dug up after the deed had been done. This goes to support the prosecution's contention that there was a pre-arranged plan on the part of the three accused to kill Dato' Mazlan. Sixteenth, there is evidence that Dato' Mazlan's shoes were found in the first accused's bedroom. No explanation was given as to how they came to be there. Seventeenth, there is evidence that some time after the murder had been committed, Dato' Mazlan's cousin visited the house at Ulu Dong. Only the first accused was there. The other two accused persons were in Kuala Lumpur. On being questioned by the cousin, the first accused falsely denied any knowledge of Dato' Mazlan's whereabouts. Soon after this visit, the first accused admittedly concealed the axe (exh. P14) and burnt Dato' Mazlan's sarong and trousers. The first accused then proceeded to Kuala Lumpur in search of the second and third accused. Lastly, medical examination showed no defensive injuries on the body of Dato' Mazlan, indicating that he had not put up a struggle of any sort. The fair inference that a reasonable jury would draw from this evidence is that a savage attack took place upon an unsuspecting victim.

We are therefore in agreement with the submission of Encik Yusof that any reasonable jury when confronted with all these circumstances would have come to the irresistible conclusion that the three accused persons committed murder and that they did so pursuant to a pre-arranged plan. It is clear that even if the confessions of the first and third accused were excluded from consideration, any reasonable jury would have found the evidence that remains to warrant the irresistible inference that all three accused committed the crime with which they were charged. The conduct of the accused subsequent to the disappearance of Dato Mazlan and their failure to furnish any credible explanation of the several incriminating circumstances that told against them leave no room for any reasonable doubt as to their guilt. We therefore reject the argument of Encik Gulam Mustaffa that the circumstantial evidence relied upon by the prosecution contains explanations that are equally consistent with innocence.

The Second Accused's Statement

Counsel for the second and third accused also complains that the learned trial judge did not adequately direct the jury on the weight that ought to be given to the second accused's statement. We have examined the statement of the second accused, admitted at his behest, and find that it does not, in any material respect, exculpate him from the crime. We are in agreement with the learned deputy, Encik Yusof, that the short answer to the complaint is that the second accused's statement is in fact inculpatory and that the trial judge had sufficiently left the matter for the jury to decide. No prejudice whatsoever was occasioned to the second accused by the way in which the learned judge dealt with the matter.

The Third Accused's Unsworn Statement

Whilst the other two accused elected to give evidence on oath in their defence, the third accused elected to give an unsworn statement from the dock. Her counsel has argued that the learned trial judge did not adequately direct the jury on the weight that ought to be given to this statement. We do not agree. The summing-up reveals that the trial judge instructed the jury that although the statement of the third accused from the dock was unsworn, they were bound to consider it and decide whether it raised a reasonable doubt in their minds. In our view the matter was put most fairly to the jury. An examination of the authorities on the subject shows that a trial judge is entitled to go much further than was done in the present case.

Lord Salmon, when delivering the advice of the Judicial Committee in *Director of Public Prosecutions v. Walker* [1974] 1 WLR 1090, explained the way in which a trial judge was entitled to sum-up on the weight that a jury might give to an unsworn statement. His Lordship said (at p. 1096):

> Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could have acquitted him on the ground of self-defence. There are however cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that

> it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it, that is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves.

In fairness to the learned judge it must be said that his summing-up on the point fell well within the parameters set out by Lord Salmon in the foregoing passage.

Substantial Miscarriage Of Justice

Having dealt with all the heads of complaint raised by counsel before us we must now turn to consider the effect of the judge's failure to ensure compliance with the rule in *Yaacob*. This really turns upon the question whether there was occasioned any substantial miscarriage of justice to the accused persons by reason of there having been withheld from them or any of them a rule of law operating in their favour.

The phrase "substantial miscarriage of justice" has its origins in English criminal jurisprudence and finds expression in the proviso to s. 60 of the Courts of Judicature Act 1964 which reads as follows:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

The other statutory provision that works in tandem with the proviso to s. 60 is s. 167 of the Evidence Act 1950. It reads:

> 167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received. it ought not to have varied the decision.

The way in which the proviso to s. 60 is to be applied has been authoritatively settled by pronouncements of English and Australian courts that have had occasion to deal with a like provision. For our part, we would respectfully adopt and apply what was said by Barwick CJ in the Australian case of *Ratten v. R* [1974] 131 CLR 510, 516 on the approach of this court to the proviso:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. *It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind.* But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration. (Emphasis added.)

So far as s. 167 of the Evidence Act is concerned, there are two authorities which we think useful to quote from. The first is *Wong Kok Keong v. R.* [1955] MLJ 13, where Spenser Wilkinson J, said (at p. 15):

> This point is of importance when one comes to consider the provisions of s. 448 of the Criminal Procedure Code. This Section refers to various kinds of error, omission, irregularity and misdirection, but it appears to me that those provisions which relate to the improper admission or rejection of evidence can be clearly separated from the rest. When this is done the section in so far as it relates to evidence reads as follows:
>
> 448. Subject to the provisions hereinbefore contained no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of –
>
> (e) the improper admission or rejection of any evidence; unless such ... admission or rejection of evidence has occasioned a failure of justice.
>
> When does the improper admission of evidence occasion a failure of justice? *Prima facie* I think it would occasion a failure of justice if it resulted in a decision different from that which would have been given had the evidence not been admitted. This, it seems to me, is what is in substance laid down by s. 167 of the Evidence Ordinance, which (omitting the references to rejection of evidence) reads as follows:

> 167. The improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision ...
>
> It appears to me that s. 448 of the Criminal Procedure Code and s. 167 of the Evidence Ordinance can and should be read together in this way – that the improper admission of evidence will have no effect unless it has occasioned a failure of justice and that in order to discover whether there has been a failure of justice one must guided by s. 167. I know of no criterion as to what 'justice' or 'a failure of justice' is except what is laid down by the law. One cannot in my opinion be guided by any such theoretical conception as natural justice. I agree, with respect, with the remark made by Finnemore J in *Semtex v. Gladstone* [1952] 2 All ER 206, 212:
>
> > I hope the law of this country and natural justice will approximate always as closely as possible, but all claims and legal defences have to be grounded in law, ant not according to somebody's idea of natural justice, not even that of the judge who may hear the case.
>
> In my opinion, therefore the sole test as to whether or not the judgment of the court below should be reversed or altered on account of the wrongful admission of this certificate is whether or not without that evidence there was sufficient evidence to justify the conviction.

The second is the well-known and authoritative work by Woodroffe & Ameer Ali entitled *"The Law of Evidence"*, 16th Edn, where in Vol. 4, at p. 3805 the following passage appears:

> Section 167 applies to both criminal as well as civil proceedings, and it is but one of the many applications of that principle which is at the root of modern legislation respecting judicial procedure, namely, that if legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impeding the course of judicial proceedings and the attainment of that substantial justice which should be their only aim.

To summarise the authorities cited, if in a criminal appeal an appellant has demonstrated errors in point of evidence or procedure it is the duty of this court to determine whether, despite the error or errors in question, there exists a reasonable doubt in its mind as to the guilt of the accused, based upon the admissible evidence on the record. If the error or errors complained of do not have this effect, then it is our duty to plainly say so and maintain the conviction.

Applying the test laid down in the authorities earlier quoted to the facts of the present case, we are of opinion that the breach of the rule in *Yaacob (supra)* has not occasioned a substantial miscarriage of justice to any of the accused. In the case of the first accused, we are satisfied that even if the evidence on the *voir dire* had been repeated before the jury it would have made no difference to the weight that would be attached to his confession. We are satisfied, after considering all the relevant material on record and the submissions made to us, that the jury in this case would have given the first accused's confession the full weight it deserved to receive. In any event, even if the first accused's confession is ignored, there is abundant cogent evidence available on the record to justify the jury's verdict against him.

In the case of the third accused, even if the rule in *Yaacob* had been observed, a reasonable jury would have entertained no difficulty in rejecting the suggestion that PW57 concocted exh. P228 and that for the better part of two days he put aside all his usual police work to engage in empty social chatter with the third accused. We are therefore satisfied that the jury in the present case would have accepted as a fact that the third accused made the confession she later retracted. Further, apart from her confession, there is available on record sufficient cogent evidence to justify the jury's verdict against the third accused.

In so far as the second accused is concerned, the rule in *Yaacob* has no application since he took the course of putting his statement in evidence.

After considering all the complaints advanced on behalf of the accused persons it is our judgment that no reasonable doubt exists as to their guilt of the crime with which they were charged. The evidence of all the circumstances of the case, including the conduct of the three accused leaves no doubt that they took Dato Mazlan's life pursuant to a pre-arranged plan. There was a cogent body of admissible evidence before the jury which they were entitled to accept and act upon. The verdict in the present case is neither perverse or against the weight of evidence.

For the foregoing reasons the appeals were dismissed. The verdict of the jury was affirmed. The sentence of death passed upon each accused was upheld.

Postscript

We thank counsel for the accused and both learned deputies who appeared before us on these appeals for their careful and well-considered arguments. We also take this opportunity to commend each and every officer involved in the investigation of this case. But for their dedication, this heinous crime would not have been discovered nor the perpetrators apprehended and brought to justice. In particular we would mention DSP Mahpop and DSP Takbir for their outstanding performance in the discharge of their duties.